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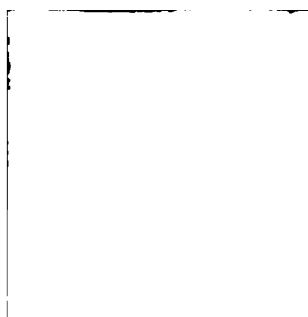
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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL,

DURING PARTS OF THE YEARS 1883 & 1884.

REPORTED UNDER THE AUTHORITY OF
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ONTARIO APPEAL REPORTS.

THOMPSON v. TORRANCE.

Mental capacity—Testamentary capacity—Will obtained by interrogation.

The testator, a man of education and a minister of the Presbyterian Church, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were entirely obtained by the person preparing it, by putting questions to the testator as to the disposition of his different properties, and suggesting also the objects of his bounty; such will, when drawn, having been read over to the testator clause by clause, who expressed his assent to some of the bequests, while as to others he made intelligent remarks, and some changes in the provisions thereof. The Court (Blake, V.C.) in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate; although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act; that there had not been any previous intention on his part to make a will; that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others; that not a single bequest or devise originated with the deceased; that the writer of the will did not know what property the deceased had, and admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several; that the will was inofficious; that the testator was 84, and during the preparation of the will, as one clause would be written out after his giving assent to a devise or bequest, he fell into a doze or sleep, from which he had on each occasion to be aroused; that it took two hours to prepare the will, although it covered but one foolscap sheet, and that the parties preparing the will sent for and obtained the numbers of the lots devised by the will from a neighbor, thus shewing that they could not obtain such information from the deceased. On appeal, the Court being equally divided, the decree stood, and the appeal was dismissed, with costs to be paid out of the residuary estate.

Per SPRAGGE, C. J.O., and GALT, J., [affirming the judgment of the Court below], that the evidence set forth below shewed that the testator was of sufficient mental capacity to execute the will, and fully understood the Act he was performing.

Per BURTON and PATTERSON, JJ.A.—Although there is no doubt as to the validity of a will made by question and answer, yet in such a case the Court is more strict in requiring evidence of spontaneity and volition than in an ordinary case, and that the evidence here shewed a want of either spontaneity or volition.

THIS was an appeal by the plaintiff from a decree of the Court of Chancery, pronounced by Blake, V. C., establishing the validity of the will of the late Rev. Dr. Barrie, as reported 28 Gr. 253, where and in the present judgments the facts of the case and the objections raised against the will are fully stated.

The appeal came on to be heard on the 14th, 15th, and 16th days of November, 1882.*

Robinson, Q. C., for the appellant.

McCarthy, Q. C., *W. M. Clark*, and *W. Cassels*, for the respondents.

The authorities cited are mentioned in the report of the case in the Court below and in the judgments.

December 11, 1883. SPRAGGE, C.J.O.—This case has been very ably argued by counsel on both sides; and the Court below appears also to have had the advantage of able arguments by counsel. The senior counsel for the defendants was the present Chancellor; and the then Vice-Chancellor, before whom the case was heard, says of counsel on the other side: “Mr. Robinson addressed to me a very powerful argument against the will, which caused me to go over the evidence more than once, and to re-peruse the authorities with care.” It is quite certain, therefore, that the plaintiff’s case has not suffered for want of able advocacy, or from any want of careful consideration by the Court below of the facts and law in the case.

Mr. Robinson makes several points against the judgment of the Court below. He says that the learned Judge, after starting with the correct principle which governs cases of this nature, departed from it in the subsequent part of his judgment. I do not find this to be the case. The learned Judge does indeed notice the shape in which the case was presented to the Court by the order transferring the case from the Surrogate Court to the Court

* *Present.*—SPRAGGE, C.J.O., BURTON, PATTERSON, J.J.A., and GALT, J.

of Chancery, observing that the peculiar form of the order appeared to have cast the onus of attacking the will on the plaintiff; but this he conceives does not make much difference, and he at once puts the case upon the correct footing. "It in reality," he says, "comes back to the proposition, as put by Lord Brougham, in *Panton v. Williams*, 2 N. C. Supp. 29: 'The course of administration directed by the law is to prevail against him who cannot satisfy the Court that he has established a will. * * There is no duty cast upon the Court to strain after probate. The burden of proof eminently lies upon him who sets up a will.'" There is another phrase to which Mr. Robinson may perhaps refer: "I am unable to conclude that there was in the deceased the absence of testamentary capacity." I do not think that the learned Judge was there touching the question of *onus probandi*. It would be strange indeed, if he could have erred upon that point, for it is a point which had been familiar to him in the Court of Chancery; and he could scarcely have forgotten the case of *Wilson v. Wilson*, decided in the first instance by himself, 22 Gr. 39, in which, referring to the case of *Baker v. Batt*, 2 Moo. P. C. 317, 319, he says, at p. 84: "This statement of the Privy Council may to some extent assist in defining the position of a Judge in disposing of such cases as the present," and he then quotes from the case; "And thus in a Court of Probate, where the *onus probandi* most undoubtedly rests upon the party propounding the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate; and it may frequently happen that this may be the result of an inquiry, in cases of doubtful competence in particular, without the imputation of wilful perjury on either side, or it may be the Judge may not be satisfied on which side the perjury is committed, or whether it certainly exists." I am satisfied that the learned Judge in considering this case acted

upon the principle enunciated in *Baker v. Batt*. Nor do I think that the judgment appealed from is open to the remark that the learned Judge does not say what evidence he believed and what evidence he discredited. He abstains, indeed, from imputing wilful untruthfulness to any. Still speaking of the "wide divergence in the opinions of many of the witnesses," he adds: "Some of these given honestly; others, biased by a desire to aid themselves or their friends, or by feelings of annoyance at the recipients of the deceased's bounty, or at those who were instrumental in procuring the will. These conclusions vary, from Mr. and Mrs. Auld, on the one hand, who say that from Thursday or Friday until his death there was no Dr. Barrie there at all, but only his body; to Dr. Herod, on the other hand, who states equally positively that up to the morning of the day of his death he was quite competent to make a will."

Then again, he notices particularly the evidence of Mr. Torrance and that of Dr. Herod; of the former that his earlier examination differs somewhat from that given when examined at the hearing, and that there are variations between his testimony and that of the other witnesses present during the whole or most of the time that the will was being prepared and signed. Mr. Robinson had characterised the manner in which Dr. Herod gave his testimony as rude and partizan, and the learned Judge said, "assenting to the justice of these comments I have not placed the same weight upon it as if the too evident bias exhibited had been wanting." He expresses his opinion of the evidence of the six witnesses, other than Mr. Torrance and Esther Argo, who were present during the whole or most of the time that the will was being prepared and signed, that he "could not but conclude that they were honestly, according to the degree of attention paid and their best recollection, relating what actually took place." Again: "I think Miss Argo was a truthful and honest witness. I was impressed favourably with the testimony of all the witnesses present at the period of the

making of the will, as a body of friends who would not for a moment think of seeking to do anything but try honestly to find out the doctor's, (the deceased,) desire as to his property, and to give expression to it."

The learned Judge has certainly not left us in the dark as to his opinion of the witnesses; and from their having been examined before him he was a better judge of the value of their testimony than we can be.

But it is said the learned Judge has said nothing as to a number of points in which the witnesses differ as to what took place during the preparation of the will. That is so; he has not attempted to reconcile these points of difference; he has only said that when these witnesses were examined before him he could not but conclude that they were honestly, according to the degree of attention paid, and their best recollection, relating what actually took place. I will presently notice these discrepancies more at large.

The Rev. James Duff, who had known the deceased for thirty years, describes him as a man of strong intellect and indomitable will. He says: "You could not thwart him; if he wanted to take a certain course, you could not take him off it." The learned Judge says of him: "He had been a man of strong mental power and determination, capable and self-willed, but these powers and his memory had been weakened and impaired by bodily infirmity." He might have added what the evidence shews, that there was a vein of humour in his composition, which shewed itself even in severe sickness and physical suffering.

Esther Argo obviously had a strong interest in a will being made by Dr. Barrie. She had learned indirectly that the Doctor, whom she had served for thirteen years, and who highly appreciated her faithful service, had purchased a house for the purpose of its becoming hers, in case she continued to live with him till his death; and she might reasonably expect, in case of a will being made, that it would contain a devise to her of the house. But we do not find that she made any move, or even dropped a hint

about the making of a will ; and I may observe here that I do not think it at all made out that there were any practices on her part to keep the Doctor's sister from a knowledge of his condition.

Dr. Herod, in suggesting to his patient that he should make his will, only did what he was in the habit of doing in other cases under the like circumstances. No blame can be imputed to him for doing this.

Very little has been said in regard to the action of Mr. Torrance in the making of this will, or of his position as a minister of the same church as that of which the dying man was also a minister ; or of the bearing of that circumstance upon the part taken by him in the making of the will. He had heard that the sick man had spoken of leaving property to the church ; and his course should have been, as a matter of propriety, not to say of delicacy, to have kept himself aloof from the matter ; to have abstained from having anything to do with the preparation of the will. It is true that Dr. Barrie had named him to Dr. Herod in preference to a lawyer who was suggested by the latter. But Mr. Torrance should have reflected that by accepting the office he was placing himself in a false position, and he should have excused himself, and persisted steadfastly in declining to place himself in that position. In my judgment, the fact of Mr. Torrance having drawn the will adds a difficulty in the way of sustaining it.

Where a party who draws a will takes under the will a personal benefit to himself, the Court requires very strong proof of testamentary capacity, and that the will is of the volition of the testator ; a stronger degree of proof than in an ordinary case. The reason is that in the case supposed the person drawing the will has a motive which does or may induce the making of a will in the shape in which it is. In *Paske v. Ollatt*, 2 Phill. 323, approved of by the Privy Council in *Michell v. Thomas*, 12 Jur. 967, Sir John Nichol said, speaking of a will under which the writer of it was benefited : " The Court is extremely jealous of a circumstance of this nature. By the Roman law *qui se*

scripsit hæredem could take no benefit under a will. By the law of England this is not the case ; but the law of England requires, in all instances of the sort, that the proof should be clear and decisive ; the balance must not be left in *equilibrio* ; the proof must go, not merely to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary ; but where the person who prepares the instrument and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person : propriety and delicacy would infer that he should not conduct the transaction."

In a later case, *Barry v. Butlin*, 2 Moo. P. C. 480, *Paske v. Ollatt* was reviewed, and in the main approved of ; the Court laying down as a rule of law : " That if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court ; and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument ; in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." The Court referred to some of the language of the Court in *Paske v. Ollatt* as equivocal ; and said (p. 484) that " if it was intended to be stated as a rule of law that in every case in which the party preparing a will derives a benefit under it, the *onus probandi* is shifted, and that not only a certain measure, but a particular species of proof is thereupon required from the party propounding the will, we feel bound to say that we assume the doctrine to be incorrect." After giving, by way of illustration, circumstances of suspicion of more or less weight, it is added, (p. 485) that in no case do they amount " to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased." " Nor," the judgment goes on to say, " can it

be necessary that *in all such cases*, even if the testator's capacity be doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the *most* satisfactory, but they are not the *only* satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it."

The doctrine that I have been discussing, and the cases from which I have quoted, have, to my mind, this application to the case before us. In the case of Mr. Torrance there was, it is true, an absence of pecuniary, and it may be said of strict personal interest altogether; but there was not, as I think, an absence of motive; and of what, in the case of some men would be a motive of a very powerful kind. The deceased had made no secret of his intention to benefit the church of which he was a minister, and no secret of his views in regard to his relations. Mr. Torrance was himself a minister of the same church, and there were motives, I should say powerful motives, to influence him to see that the interest of the church should not suffer through apathy or lack of vigilance on his part; and moreover, there would be a certain degree of credit and honour attached to his obtaining for the church the benefits that it was in the power of the dying man to confer; and it can scarcely be doubted that there was, as it was natural that there should be, a personal desire on his part that the church should not be baulked of obtaining the benefits which the testator had expressed his intention to confer; and the very fact that the will that he was preparing would as he prepared it not enure to his own personal advantage, but to the furtherance of an object which he would regard as one of high importance and value in the interest of his church, would be a very powerful motive in the minds of many men in Mr Torrance's position to be

more persistent in procuring a will containing such provisions to be executed, than he would be if he obtained a personal benefit under the will. I do not say that Mr. Torrance did, or that he would, allow such motives to influence him to do that which would be wrong. I only say that such influences did in fact exist, and that they have been known to influence men under the like circumstances; and therefore that it cannot be said that he stood indifferent as to what disposition the deceased might make of his property. It follows, I think, that the principles which obtain where a party writes or prepares a will under which he obtains a benefit, ought in reason to apply where a clergyman writes or prepares a will under which his church obtains a benefit; and more especially so, where, as in this case, the will is prepared at a time when death is approaching the testator. And I may add, that the policy of the law is entirely in accord with the views that I have expressed.

The argument that has been addressed to us on the score of the will being inofficious does not strike me as being of much force. In the case from which I have largely quoted, *Barry v. Butlin*, the same objection was made, in addition to the circumstance of the will having been prepared by one who took a benefit under it. In that case the testator was a man of a very different style from the testator in this case, "a person of slender capacity, of a retired disposition, indolent habits, and addicted to drinking, somewhat singular in his appearance, frivolous and even childish in his amusements, and occupations." (p. 487). He had an only son; and that son, together with his other relations, was passed over in his will. Upon that Baron Parke observes: "That he should pass over his own relations is rendered highly probable under the unhappy circumstances of this case." He had become estranged from his son, and appears to have discarded him, in consequence of discreditable and apparently criminal conduct. His daughter had died, and he had then no relations except "the Neales," and "from them also, (as the judgment says,) it is equally clear that his

regards, if he ever entertained any, were estranged," The judgment of the Court was, that the will was established, and ought to be admitted to proof.

We are referred to *Montifiore v. Montifiore*, 2 Add. 354. The case turned a good deal upon the fact of the paper propounded being not perfectly and formally executed, and "going in effect to revoke an executed will, and to put an immense property in a course of distribution, which is far from being an officious one." The language of the Court upon the question of testamentary capacity is general, and, with that of many other Judges, has been often quoted. The language of the same learned Judge, Sir John Nicholl, in *Brogden v. Brown*, 2 Add. 449, is more directly applicable to this case. "The rule that where capacity is at all doubtful, there must be *direct* proof of instructions, only applies, or at least only applies with any degree of *stringency*, where the instrument is inofficious, or where it is obtained by a party materially benefited; or a *fortiori* where it is both." Upon this I need only observe that this language of Sir John Nicholl was not called for by the case in which he used it. It was, therefore, while the language of a very learned Judge, a dictum only; and is directly met and controverted by the judgment delivered in the Privy Council in *Barry v. Butlin*, which I have quoted.

Further, upon the will being inofficious; we must look at the life and position of the deceased, and his relations with his next of kin. He had adopted a life of celibacy. He had been many years a minister of his church. His intercourse with his sister had been but infrequent. She was married, and in no way dependent upon him. During the thirteen years before his death she had visited him about once a year, and during the same period he had visited her only about twice. It does not seem to me to be by any means extraordinary that such being the circumstances he should think that he owed a duty to his church rather than to his sister. And he had spoken of his relations to both, and of his intentions in regard to both, in such terms as to make

it no matter of surprise that his will should make some provision for his church and none for his sister.

This will is open to the further objection, that it was not framed from instructions given by the deceased himself, but from his answers to questions put to him by Mr. Torrance, and others who were in the room with him; that not one of the provisions of the will originated with the deceased himself, so far as we see by what passed upon the occasion of the making of the will. A lawyer would have known that drawing up a will from questions, and from suggestions made by himself or others about him was an unusual course, which could only be properly resorted to under very exceptional circumstances; such for instance as existed in the case of *Green v. Skipworth*, 1 Phill. 53; where the sudden access of a very painful illness made speaking by the testator a matter of extreme difficulty. The first provision of the will was dictated by him. The second was upon this interrogatory: "In case of anything happening to you, who do you wish to have the farms, the Skipworths, Mr. Wilson, or who?" The answer was, "Mrs. Green." This question and answer, taken down verbatim, and signed by witnesses was, with the portion dictated, admitted to probate as a testamentary paper, Sir John Nicholl observing: "A will made by interrogatories is valid; but undoubtedly wherever a will is so made the Court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition, than it would be in an ordinary case. But if there is clear capacity; if there is the *animus testandi*, and if the intention is or may be reduced into writing, the Court must pronounce for it."

In a subsequent case before the same learned Judge, *Bird v. Bird*, 2 Hagg. 142, there was, as we see by the report and the note appended to it, much importunity, and but little spontaneity. There was evidence of recognition afterwards, and the learned Judge pronounced for the will.

It certainly is not explained satisfactorily why the deceased was not asked to state his wishes and intentions

instead of questions being put and names suggested to him. There was the presence of great drowsiness after the suffering of the previous day, and probably consequent upon it. The hour was late—after nine at night—and he was weak and weary. I do not see, upon the evidence any sufficient ground for imputing any intentional wrong to Mr. Torrance in the course that he took, and I understand the learned counsel for the plaintiff to disclaim the imputation of wrong. Mr. Torrance, very probably, conceiving himself possessed in a general way of the intentions of the testator, may have taken the course that he did in order to spare the deceased the effort and the fatigue of dictating the instructions for his will. It was, I take it, a foregone conclusion in Mr. Torrance's mind that the deceased intended to devise the house and lot to Esther Argo, and the evidence shews that such was his intention ; and that it had become known as well to Mr. Torrance as to some others. His intention to benefit the church was also no secret ; but he had to learn from him in what shape he intended to benefit it ; what schemes of the church, as they are called, should be the channels through which his bounty should be conveyed. There were in all six or seven of these schemes, and among them were the foreign mission, the home mission, and the endowment of Knox College. After ascertaining and noting his intention in favour of Esther Argo, the testator was asked as to his sister, then as to his niece, Mrs. Mitchell, then as to friends in New York, then as to a Miss Agnes Strachan, a relative in Scotland, and then he was asked as to the church ; and he was asked also if he would leave something to the hospital. I think that is the order in which these things were put to him, but it is not very material. It is not very clear how the question as to the church was first put to him ; whether he was asked if he would leave something to the church, or if he would leave the rest of his property to the church. I will refer to that point again presently.

Now it is very clear from the evidence that the testator was not, by any means, a passive instrument in the hands of Mr. Torrance, or of any one.

Some suggestions made by him were accepted, some were negatived, as also were suggestions made by Esther Argo, and a suggestion by Mr. Gow as to the hospital; and his answers were not merely yes or no, but as to some he gave a reason for his refusal. Mr. Torrance went over the schemes of the church with him twice. The question was put, very much as it was put in *Green v. Skipworth*.

It is worthy of note, that the next of kin was not ignored upon this occasion. Her name was distinctly presented to the testator for his consideration, and he received it unfavourably.

I have so far noticed what took place upon this occasion only with reference to the objection that the will was framed, not from instructions by the testator, but from suggestions, and from questions by Torrance and others, and answers by the deceased. We naturally look at what took place to see how far we can trace the volition of the testator in what passed; and whether what we find put down as his will was really his volition or not; whether there was present the clear capacity, the *animus testandi*, which Sir John Nicholl speaks of.

Some peculiarities of speech have been laid hold of as indicating want of capacity. One is, his answer to Mr. Torrance's question, whom he would appoint his executor, that he gave the name of his questioner "Robert Torrance," instead of saying "yourself." I really think there is nothing in this. From such a man as he was the answer was not strange, only probably a touch of that humour which was habitual to him. Again, the words "that is the drawback," may have meant something or nothing. Mr. Torrance, after getting from him his wishes upon any point, left him and put it in writing; and while he was doing this the deceased fell into a sort of doze, as Mr. Torrance says, and had to be roused from it, in order to ascertain his wishes upon the next point. The devise to Esther Argo appears in the will as "fourthly," and this phrase was used when he was asked as to that devise. The words are entirely unmeaning if supposed to be applied to that

devise. They were used when he was roused from his doze, and required to make an effort to continue the making of the will. The words may have been used by way of exclamation to himself, at the painful effort that it cost him, to accomplish his purpose of making a will; or he may have been but half roused when he used them, or he may have used them in reference to some thought in his sleep. However that may have been, his mental power was soon rallied; and he shewed that he perfectly understood the question, by the answer that he gave to it: "Yes, if she bide with me to the end of the chapter." These things do not, to my mind, amount to anything.

But it is urged, the witnesses vary a good deal in their account of what passed at the making of the will. This may easily be accounted for, without at all affecting the real question in the case, the testamentary capacity of the testator. Some were in the room the whole of the time, some only a portion of it. Some may have paid more attention than others to what passed. The absence of the artificial teeth which he was in the habit of using would naturally make his utterance somewhat indistinct, and he would be better understood by some than by others. Wm. Mitchell says: "There was a great difference between the articulation with the teeth and without them." Then there is the difference in memory, in intelligence, in accuracy of thought and language, between different persons; and there is the fact that most of those present felt but little, if any, interest in the disposition that the testator might make of his property. It can be no matter of surprise if the account of what passed given by these different persons varied in several particulars. And there is this important fact, that the evidence given by one and all of them was *honest evidence*. We have this from the learned Judge who heard and saw them; and there is nothing in the case to lead us to think otherwise. What they have said in evidence is perfectly consistent with each of them being a truthful witness.

If the issue to be tried were whether an agreement

alleged to have been made in the presence of several witnesses was established by the evidence of those called to prove it, and those called to prove it varied a good deal in their account of what passed, it might be impossible for the Court to pronounce the agreement established upon such evidence; but the issue here is entirely different. We may be unable to say from the evidence before us which of the witnesses are right and which wrong, as to the order in which different matters were brought under the notice of the testator; whether he gave his assent by the monosyllable "yes," or by the words "that is correct," or some other signification of his assent; or whether the several schemes of the church were named to him once or twice, or whether only the three that find a place in his will were named to him; or who are right and who wrong upon the several other points in which they differ. All these things are utterly immaterial to that which is the true issue, and do not touch the competency of the witnesses to speak to the true issue. They all agree in all that is really essential. They agree that the name of the sister was proposed and rejected; the name of the Mitchells, and of friends in New York also proposed and rejected; the name of Agnes Strachan received with more favour as standing in need of his bounty. The amount to be bequeathed to her canvassed upon the will being read over after its completion, the proposal in favour of the Hospital negatived. These things passing in their presence afforded them the means of forming a judgment as to the mental capacity of the testator, and they all agree in opinion, though expressing it in different terms, that he was of capacity to know and understand what he was doing.

Mr. Torrance made some amends for his faulty mode of getting from the testator an expression of his wishes, by going over the will after he had written it out, clause by clause, and asking the testator, after he read each clause, if it was correct, and obtaining his answer, which was one of assent, with the exception of the bequest to Agnes Strachan, to which I have already referred. What passed in relation to that bequest is a material piece of evidence shewing

fixedness of attention and alertness of mind, in regard to the act that he was doing. During this reading over there was, as I understand from the evidence, no drowsiness, but a comprehension of the will, clause by clause, and, as I judge, a comprehension of it as a whole.

It is not necessary to say that the testator could have possessed himself of such continuity of thought and attention as would be necessary to the full comprehension of a long and intricate document with contingencies and alternative dispositions of property ; and yet I am not satisfied that he could not, for he had been for many years a clergyman of the Presbyterian church, having ceased from active duty only two years before ; and his library consisted principally of theological works. In this will, however, there was nothing intricate. It was simple and direct. A gift to his house-keeper of that which he had not only destined for her, but purchased expressly for her ; a gift of \$200 to a poor relation ; a gift to schemes of the church, with which he was familiar ; and lastly, (apparently to supply an omission in the first gift,) a gift of furniture, books, and other effects to his housekeeper to be kept or disposed of in her discretion ; a discretion that, as appears by the evidence, was contemplated that she should exercise in respect of the books.

Dr. Taylor, in his book on medical jurisprudence says, under the head of senile dementia : " If a medical man is present when a will is executed, he may easily satisfy himself of the state of mind of a testator, by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property " This, as a piece of advice, is well enough, but I do not think that we find authority for saying that if a testator failed to do this a will made by him would necessarily be pronounced against. Further, as to Dr. Taylor's suggestion, I do not think the evidence shews that the condition of Dr. Barrie was that of senile dementia ; and further, the evidence leads me to believe that if this test had been applied to Dr. Barrie just after his execution of the will he had mental capacity to stand

the test. And I think, from the evidence of Dr. Herod, of the Rev. Mr. Howie and others who speak of his condition on the following day, Saturday, it is probable that he could on that day have stood the same test. He expressed to Dr. Herod on that day his satisfaction at having made his will; and his apt quotation from Scripture in answer to a question from Mr. Howie was an indication of mental activity.

With regard to the evidence of Dr. Herod, I certainly do not understand the learned Vice-Chancellor to have discredited it, though he attached less weight to it by reason of the bias the doctor manifested in favour of the defendants. Giving that circumstance (of which the learned Judge could form a better estimate than we can) its due weight, the evidence of the doctor is not to be discarded; and giving to it only the weight that I understand the Vice-Chancellor to have given to it, it is of great value. He was with his patient twice (perhaps three times) on Friday, the day the will was made, he suggested to him the making of a will, and the sick man at once acceded to the propriety of the suggestion. There was no over-persuasion—none was needed—he was last with him on that day shortly after seven in the evening. It was settled that he was to make his will that evening. The doctor left him intending to return; but did not—pleading fatigue—he saw him the next morning. No one could be more competent than the doctor to gauge accurately the mental capacity of his patient; and he speaks confidently of its being quite sufficient to enable him to make a will. There is also the evidence of the Rev. James Duff, who had known him for thirty years. It is material as being opposed to the evidence of the Aulds and others as to his condition on the Friday up to four or five in the afternoon, when, as he says, he was obliged to return home. The testator had on Thursday been suffering severely from the effects of a medicine that he had taken, but at about midnight of that day, when he and Mr. Gow were sitting up with him, he was, as Mr. Duff says, “as clear in his mind as ever.”

But for the opinions of my brothers Burton and Patterson I should have considered the case free from doubt, so far as the devise and bequest to Esther Argo are concerned. The *intention* of the deceased in her favour is clear beyond question. The will was not drawn by her; the provisions in her favour were not suggested by her; and it seemed to me quite certain that the deceased comprehended perfectly the devise and bequest he was making to her. Her case is free from the difficulties that have been suggested in regard to the gifts to the Church; and if I had found that those difficulties were such that the gifts to the Church could not stand, I should have been prepared to establish the will in part—the portions in favour of Miss Argo, and I should say in favour of Miss Strachan also; and to refuse to establish it as to the Church. This course was taken in the case of *Billinghurst v. Vickers*, 1 Phill. 193, which I think was not referred to in argument.

I have not quoted from the many judgments in which the mental capacity necessary to the making of a will have been discussed and explained, because, in the view that I take of the case, there are in it those circumstances in relation to the gift to the church which are styled in *Barry v. Butlin*, circumstances of suspicion, demanding, as is said in the judgment in that case, “the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. In holding that the case for the church called for such investigation, I have placed the case of the plaintiff as high as it can be placed.

I think, upon a careful consideration of all the evidence, that the case does stand the test of such investigation. Few cases that come before the Courts do stand the test so well as, in my judgment, this case does. Where a man is wise enough to make his will when in the full vigor of his mind and body there is no room for question; but where it is left to sickness and old age, and relatives are disappointed, questions arise as to mental capacity, and these are the cases that we find in the books.

The evidence against the testamentary capacity of the testator in this case I regard as extremely weak. I have already observed upon the discrepancies to be found in the evidence of those present at the making of the will, and of the light in which, in my judgment, they should be viewed in relation to that which is the real issue in the case.

Upon the point whether the gift to the Church was an indefinite something, or the residue of the testator's estate, I do not myself feel any doubt. His previous intentions as disclosed by himself are spoken to by the Rev. James Duff, by George Barron, by John A. Armstrong, and by James Lochrin; to the three first, and to Elizabeth Armstrong he intimated his intention of excluding his friends, and to the last named he intimated no intention in their favor, but rather the reverse; his language to him was that "he paddled his own canoe from his youth up; and that he wasn't indebted to his friends."

What took place at the making of the will looks like a carrying out of these declared intentions. Everything that passed indicated an intention of making a disposition of *the whole* of his property. At the first mention of the Church the shape of the question or suggestion may probably have been whether he would give something to the Church; but the claims of all others were canvassed and he decided upon them, and he could not but have known that any part of his estate as to which he might die intestate would devolve upon his sister; and he had distinctly negatived a suggestion that something should be left to her; and the persons present all speak as if it was the residue of the property after the particular gifts that was to be divided among certain schemes of the Church; the words "the rest," were used. Then the language of the will itself is perfectly distinct: "I will and direct that the residue of my personal estate, after meeting and satisfying all claims, be divided between," &c. This clause was, like the rest of the will, read over by itself to the testator, and assented to by him; and after the writing of the will was finished was again read over to him, when, upon each clause being read separately, the

testator was asked as to each if it was correct. He must have had far less mental power than the evidence, in my opinion, proves that he had, if he did not perceive that by that clause he was giving the whole of the residue of his property to the church.

I have given to the several objections urged against this will all the weight that in my judgment they are entitled to ; and to the circumstance of the will having been drawn by the Rev. Mr. Torrance I have given more prominence and weight than was given to it in the Court below, or I think in the argument of plaintiff's counsel.

I am satisfied that the case received from the Vice Chancellor, as it has received from this Court, the vigilant care and circumspection demanded by the circumstances under which the will was prepared and executed. After investigating it with due regard to those circumstances, very ably pressed upon our consideration by the learned counsel for the plaintiff, I have felt, to use the words of the Court in *Barry v. Butlin*, "full and entire satisfaction that the instrument did express the real intentions of the deceased." I should have arrived at that conclusion from a mere perusal of the evidence. I am greatly strengthened in that conclusion by the expressed opinion of the Judge of first instance, as to the truthfulness of the witnesses who were present at the making of the will.

A question is made as to the bequest to Knox College. It is objected that it is void as tending to create a perpetuity ; and *Re Dutton*, 4 Ex. D. 54, is cited in support of the objection. The bequest is to "the endowment fund of Knox College," and the subject of the bequest is personalty. Under the Statute of Canada, 22 Vict. ch. 69, (1858) Knox College is empowered to acquire estate or property, real or personal, by gift, grant, conveyance, devise, bequest, or otherwise to and for the use of the college, with certain restrictions as to the continued retention of real estate in the shape of real estate, with no restriction or limitation in regard to personalty, as to amount or otherwise. Unless this Act be *ultra vires*—and it is not contended that it

is so—it was within the powers conferred upon the corporation of Knox College to take hold and enjoy this bequest, and the law in relation to the bequest brought into question in *Dutton's* case does not apply. A bequest to the endowment fund of the college is, in my opinion, within the trusts authorized by the Act.

I think the direction in the Court below as to costs is right. The real contest was, the presence or absence of testamentary capacity; and there are no exceptional circumstances, as there were in the cases cited, and in the cases referred to in the cases cited, to take the case out of the general rule. It is true that the gifts to the church, “so far as they are made payable out of personal estate savouring of the realty,” are by the decree excepted from the general declaration and decree establishing the will; and if the costs had been increased by any contest upon that point, it might have been proper that such increased costs should have been dealt with separately from the general costs of the cause, but I do not apprehend that the costs have been thereby increased. I think that they are properly made payable out of that fund.

BURTON, J. A.—It was contended by the learned counsel for the respondents that the question in issue was purely one of fact, and that this Court ought not therefore to interfere with the decision of the learned Judge who has pronounced in favour of the will.

There is a class of cases, however, and this is one of them, in which the duty is thrown upon us of reviewing questions of fact, and we cannot shrink from that duty, although in all such cases where there is a conflict of evidence we should be extremely slow to differ from the decision arrived at by the Judge, who had the opportunity of hearing the witnesses, and taking down their evidence, and personally witnessing their manner of giving it, and ought not, as it is said in one of the cases, to be called upon to decide which side preponderates on a mere balance of evidence; but bearing this in view, and passing over the

evidence of any witness which for any reason the learned Judge has thought fit to discredit, we are bound, in my opinion, to approach the decision of this case in the same manner as if we were sitting as the primary tribunal before which the application for probate was made. I can regard such an appeal as the present in no other light, unless we are prepared to ignore the law which throws upon us the difficult and frequently unpleasant duty of reviewing the facts as well as the law.

Before proceeding to the examination of these facts, I shall cite one or two authorities in confirmation of the view taken by the learned Judge, that notwithstanding the form of the order transferring the case from the Surrogate Court to the Court of Chancery, the *onus probandi* was upon the parties propounding the will, and that the conscience of the Court has to be satisfied by the party setting up the will, that it is the will of a free and capable testator. To the same effect as those referred to by the learned Judge are *Crowningshield v. Crowningshield*, 2 Gray 526; *Browning v. Budd*, 6 Moo. P. C. 430; *Ingram v. Wyatt*, 1 Hagg. 388.

The general principles of law in relation to the capacity of a person to make a will are well understood, but the great difficulty is in applying those principles to the testimony in the particular case.

The testator must, in the language of the cases, have sufficient *active* memory to collect in his mind without prompting the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them.

"It is," said Sir John Nicholl, (*Marsh v. Tyrrell*, 1 Hagg. 122,) "a great, but not an uncommon error, to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind and is capable of making a will, whereas the rule of law—and it is the rule of common

sense—is far otherwise. The competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.”

In *Combe's Case*, (*Moore's Rep.* 759,) “It was agreed by the Judges that sane memory for the making of a will is not at all times when the party can answer to anything with sense, but he ought to have judgment to discover and to be of perfect memory, otherwise the will is void”

It being then clear that the parties propounding the will were bound to satisfy the Court that the paper produced does declare the will of the deceased, and that he was at the time of its execution of sound and disposing mind and memory, I proceed to the examination of the evidence, which is very voluminous.

It may, I think, be taken as proved that up to the Saturday preceding the making of the will he was competent, although the evidence is not all to that effect; but on the day preceding the making of the will he was much worse, from the effects of medicine he had taken, and was admittedly not then in a fit condition to make one. The difference among the witnesses is as to his state on the Friday, the day on which the will was made, as it is said, between the hours of nine and eleven. it having occupied, although containing only seven short clauses, from an hour and a-half to two hours in its preparation.

Whatever conclusion we may arrive at in reference to the validity or invalidity of this will, I do not think that any decision would indicate that there was anything in the nature of a conspiracy on the part of the parties called to support it, much less that it would stamp any of the parties with virtual forgery with an attempt to support it by perjury, as it is said is the case made by some of the witnesses for the plaintiff.

Many persons, as I have already pointed out in the extract from Sir John Nicholl's judgment imagine that if a person can understand a particular question and give a rational answer he is competent to make a will, but to form a correct estimate upon the subject it would seem

the witness called to prove this competency of the testator should possess not only general skill and experience upon the question, but that he should have had a long and familiar acquaintance with the person, or at least an ample opportunity to observe the precise state of the mental powers.

The learned Chief Justice has referred to a rule pointed out by Dr. Taylor in his Medical Jurisprudence. I will merely add that he condemns the conduct of medical men who allow themselves to become witnesses to wills without first assuring themselves of the actual mental condition of the testator; and he adds, if a sick person cannot repeat substantially the leading provisions of his will from memory without prompting or suggestion, there is reason to believe he is not of a sane and disposing mind.

The same view is enforced by Chancellor Walworth, who declared that no person is justified in putting his name as a subscribing witness to a will unless he knows from the testator himself that he understands what he is doing. * * By putting his name the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness when he is dead or out of the jurisdiction of the Court. : *Scribner v. Crane*, 2 Paige, at p.159.

One cannot but contrast these high authorities and their opinion of what should be done to test the capacity of a testator, and what was actually done in this case; and, without the slightest imputation upon the honesty and good faith of Mr. Torrance, but simply with the view of testing his competency to form a correct judgment, I cannot avoid referring to the rather reckless manner (and in using the term reckless I again say I acquit him entirely of intentional wrong-doing) in which he made statements in his answer under oath, to the effect that he believed that Mrs. Thompson did not treat the deceased with the kindness usually shewn by a sister to a brother, and that he never had any intention to leave her any of his property;

whereas, in his evidence, he admits that he knew nothing on the subject, and that he had never heard of the slightest difficulty between them ; and I might refer to other charges in the answer, admitted in his evidence to be equally without foundation.

I discard for the present the evidence of those witnesses who say that the testator was, in fact, in a stupor from the Thursday until his death, and shall take up the evidence of those only who were called in support of the will, with the exception of Dr. Herod, whose evidence the learned Judge admits was given with a strong bias, and which I shall refer to separately. He was not present when the will was actually executed. The evidence shews, and the learned Judge has found, that it was only at intervals between Thursday and his death when the testator's intellect was reasonably clear, and he is unable, of course, to say of his own knowledge whether the will was executed at one of such periods.

So far as the mere opinions are concerned, they can only have weight and value where the witnesses state the facts upon which they are based. Opinions are much more frequently founded on prejudices derived, it may be, from mere rumour, or biased by our feelings, than we are ourselves aware of, so that it is no uncommon thing to find two witnesses equally honest and intelligent forming opinions directly opposite to each other, though based on the same facts.

I may say, however, before going over the evidence, that there can be at this day no doubt as to the validity of a will made by question and answer, but in such a case the Court is more strict in requiring evidence of spontaneity and volition than in an ordinary case. What is contended here is, that in no single instance did the testator suggest anything, nor was any effort made to get him to suggest anything. That in none of the devises except that of the house and lot to Miss Argo, had the testator at any time expressed any intention to make the disposition of his property which is made by this will.

In the case of *Constable v. Tuffnell*, 4 Hagg. 477, affirmed, 3 Knapp, P. C. 122, the instructions, though not proved to have originated with the testator, were approved of by him when perfectly competent, and the disposition of his property then proposed was then completely understood, approved of, and adopted, and the will itself embodied such disposition. It was read over to the deceased, and he assented, as the witness said, more by a motion of the head than by words; but the solicitor in that case, not having received the instructions from the deceased himself, thought it necessary to observe more than the usual caution, and repeated the nature of the bequests, and asked if that corresponded with his meaning.

In *Goodacre v. Smith*, 1 P. & D. 359, the will was not read over, but there was evidence that the testatrix had previously informed the attorney who prepared it of her wishes as to the disposition of her property after her death, and she gave instructions to Mrs. Goodacre to take to her attorney, adding that he knew her wishes. The evidence of the attorney was that the will as drawn up by him was in accordance with the instructions so brought to him, and with her previously expressed wishes. The Judge had at first some doubt whether there was evidence for the jury of the knowledge and approval by the testatrix of the contents of the will, but eventually he considered that there was evidence, in this indirect way, that she was practically aware of the contents of the paper to which she set her hand. From the remarks made by the Judge, when disposing of the costs, it is not improbable that he would have arrived at a different conclusion from that come to by the jury.

One of the witnesses referred to by the learned Judge as testifying to the competency of the testator was John A. Davidson, who was one of the witnesses to the will. It appears that he did not see the testator on the day the will was made until about eight in the evening; he was not in the bedroom when the will was being drawn up, but says he was called in when it was being read.

He says, however, that he overheard *portions* of "the remarks between Mr. Torrance and Dr. Barrie," whilst the will was being prepared. He says that he heard Mr. Torrance ask the testator if he intended to give the house and lot to Miss Argo, and that he replied: "Yes, if she abide with me to the end of the chapter."

He is uncertain as to the form of the next inquiry, but says it was either "How much would he leave Mrs. Thompson, or would he leave Mrs. Thompson anything," and that he said "No, she had enough." That Mr. Torrance then asked, "would he give Mrs. Mitchell—leave her anything." He does not remember the words, but the inquiry was: "Would he put down anything for this party." He says that Dr. Barrie spoke *loud* when he answered and he could hear him distinctly in the dining-room, but he says *there was no conversation beyond the answers to the questions put*. He says that Mr. Torrance asked him how much he would give Miss Strachan, adding, *they decided \$500*, which he explains by saying that Mr. Torrance mentioned \$500, and that the testator responded assent to it. When asked to give the words, he says: "I think he said yes."

This witness's recollection in reference to the books and furniture is very hazy. He first states that Dr. Barrie said they were to be left to Miss Argo; then he says, I think Mr. Torrance probably asked him *whom* he should leave it to; and then in reply to that inquiry, that he must have answered *yes*, because it was incorporated in the will; and eventually he admits "I do not remember now anything as regards the furniture."

As to the balance of the property, the witness says that Mr. Torrance asked him if he would leave it to the three schemes of the church, mentioning only three, and that the other said yes. He mentions also that Mr. Gow said he should leave something to the hospital, "but before it was written down he said no, that he would not give it, that he was only a poor man, or something to that effect." He repeats that the three schemes only were mentioned, but

that they were repeated once or twice. He states that after each assent Mr. Torrance came into the dining room, and wrote the sentence containing the bequest.

He describes the reading of the will, and says: when Mr. Torrance came to the \$500, he said he would not; that several sums were then mentioned, and he said "make it \$200," but in the very next answer he says: "I do not know that he mentioned any sum, I do not think he did," and afterwards he says: Torrance asked him if he would make it \$200, and he said "yes." He then says: the reading of the will was proceeded with, and Mr. Torrance asked him, I think, as he read each section, was that correct, and he said: "Yes." He adds this was the only word used; he did not on any occasion say "that is right," "exactly so," or "perfectly."

Walter Scott is the other witness to the will, and certainly appears to have been as unsuitable a person as could well have been selected for the purpose; he gave his evidence manifestly in a very unintelligible manner, but differs from the other witness in reference to the tone in which the testator spoke; he says "he spoke low;" the other says: "he spoke loud, and we could hear him distinctly where we were sitting;" and whilst the other witness says he used no other word than yes, this one says that he replied to the inquiry of Mr. Torrance, "I know what I am doing."

But the evidence of this witness is valueless for the purpose of testing the capacity of the testator. He contradicts himself in many particulars, and confuses conversations he has had with other parties with what occurred on that occasion. He says he came in when the will-making had proceeded for some time, and the first thing he heard was about leaving the money to Nancy Strachan.

The last witness describes the conversation about the nieces in New York as having occurred, in his opinion, previously to this; but this witness, after first stating that he heard Mr. Gow or Miss Argo ask him if he would not leave some money to them, and stating at first that the

testator's reply was that they had enough, and then correcting himself and saying they were able to work for their living, admits that he did not hear that question at all; and his recollection, contrary to that of the other witnesses, is that he spoke low and said he was satisfied with the clauses as read, although he cannot recollect the precise language used.

Elsie Davidson says she came in when the legacy to Agnes Strachan was being spoken of, and one would infer from her evidence in chief that the testator had in terms stated that he wished to give her \$500, and she says that the cousins in New York were then spoken of, and that he said they were young, and could work.

The witness differs from Davidson as to three schemes only being mentioned; but what strikes one as strange with this as with all the other witnesses is, that not one single disposition appears to have originated with the testator; she says that Mr. Torrance asked him if he intended to leave *anything* to the church.

When asked what was the answer, she does not say that he discussed the amount or the particular mode in which he proposed to benefit the church, but the witness gives the somewhat inconsequential reply: "Of course he had to ask over the question;" pressed as to why that was so, she says, "Well, he did ask him the questions."

At last the counsel remarked to her, after endeavoring in vain to get a straight reply to his inquiry. "The ordinary way is to ask what he means to do with his property, and wait till he tells you," to which she remarked: "That is what they did."

The remark I have made above as to the utterly valueless character of opinions without the facts applies, I think, with full force to this witness's testimony. The learned Judge quotes from her evidence the remark: "She never thought but that he understood the will," but when we refer to her evidence in detail, it is far from satisfactory; when pressed to explain why he (testator) did not, himself, select some particular schemes and apportion the

amount, she evades the question, and when further pressed to give his words, she answers: "Of course, he meant to leave it; he said it would be equally divided between the schemes of the church," and she is finally obliged to say that she cannot recollect Dr. Barrie's words, or that he himself mentioned any one of them, but, at last, brings, herself to think that she heard Dr. Barrie say, or as she, herself, expresses it: "I thought for sure I heard him say, 'equally divided between the schemes of the church,'" and she admits she does not know what schemes, she understood it was all the schemes.

Gow differs from all the other witnesses. He says that Mr. Torrance did not suggest that the house and lot should go to Miss Argo, and although he agrees that each bequest was written down as agreed to, he states that the bequest of the books and furniture immediately followed the devise of the house and lot, and when asked about them the testator replied, Esther was to get them; and then in reply to a suggestion or inquiry, "Is she to get the books and everything that is in the house," he replied, "Yes." He also states that he consented to give \$100 to the hospital, which was written in the will, and that when it was read over he objected. He contradicts the other witnesses as to each sentence of the will being assented to as it was read.

Mrs. Elizabeth Armstrong got to the deceased's house about 3 o'clock in the afternoon of the Friday on which the will was made.

She differs from Gow as to first giving and afterwards retracting a legacy to the hospital, but says when it was mentioned he said no; but the witness confirms what I have already referred to as the leading and extraordinary feature of this case, that in no single instance did he suggest anything.

Her version is that he was asked whom he would leave the rest to, and he did not seem to answer, and then he was asked about the Home Mission and the Foreign Mission, equally divided, and he said yes. She says that she does not remember his ever stating what he meant to do with

his property, but had heard him say that none of his friends would ever get any of his money.

Throughout, with the exception I shall presently refer to, the assent appears to have been given by the monosyllabic "Yes;" but a portion of the witness's evidence is misleading; for instance, she says when in reading the will they came to the \$500 he thought it was too much, and he altered it, whereas when explained it all comes back to the suggestion on the one side and the assent on the other.

This witness does it is true state, and in that respect she differs with several of the other witnesses, that Miss Argo's name was not mentioned when he was asked as to the disposition of the house and lot, and she differs from all the other witnesses but one in reference to the disposition of the books, which she says occurred immediately after the devise of the house and lot, and that deceased suggested Miss Argo's name. This is at variance not only with Mr. Torrance's evidence, but with the actual fact, as to which there can be no mistake—if the will was made in the manner suggested—that the matter was discussed and written in as the last clause of the will.

She differs from the other witnesses as to the order in which names were suggested, and intimates it was she who first suggested the church, and then Mr. Torrance that it should be equally divided; and she states that, although present all the time, she never heard any other schemes mentioned than those included in the will.

The only other witnesses who were present at the making or reading of the will whose evidence I propose to discuss are Miss Argo and Mr. Torrance.

Miss Argo gives the same kind of evidence as to the nature of the assent given to the suggestions. When Miss Strachan's name was mentioned and he, deceased, was asked whether he would leave her anything, or how much he would be willing to give, he made no reply: when asked if he would give her £100, he gave his assent, but whether by the word yes, or otherwise she is not positive.

She was not present during the whole time that the

will was being prepared, and does not throw much light upon what is said to have occurred, except to confirm the view that he had no part in fixing the amount to be given. He was asked, in the first place, if he wished to leave *anything* to the funds of the church, and then, instead of waiting for him to fix the amount or making an effort to get him to do so, Mr. Torrance proceeded to ask him if he should divide the money equally between them.

What was said, according to this witness, about the Bible Society, does not very clearly appear, or whether he was distinctly asked to subscribe anything; but he appears to have said either that it was prospering, or that it was doing noble work, or something to that effect. She says that when the first clause relating to the house *was read*, he said he would leave it to me if I would abide with him to the end of the chapter, although I am not aware that any other witness deposes to that fact; and she states that, at the end of the reading of each clause he expressed his assent, not by a simple yes, but by the statement, that will do, or, that is right.

I shall feel it right to extract largely from Mr. Torrance's evidence, not so much for the purpose of contrasting what he says occurred during the preparation and execution of the will with the version given of the same transaction by the other witnesses called on the same side, as for the purpose of shewing that he did not use those tests which ought reasonably to have been resorted to for the purpose of ascertaining whether the testator had the capacity of recollecting events, and the proper command of his reasoning faculties for the performance of so important an act as the making of a will, although it appears upon his testimony that the testator was not so reduced by weakness as to be incapable of expressing himself only in monosyllables; but spoke loudly, and was "perfectly capable of telling what he wanted." And for the purpose also of shewing that no effort was made to get the testator to express his own wishes; the names of the parties to be, benefited being invariably suggested before he had an opportunity of doing so.

If there is one thing clearer than another in this matter it is, that the house and lot were purchased by the deceased with the intention of giving it to Miss Argo, if she was still with him at the time of his decease; and yet when the question is first suggested as to what disposition he wishes to make of it, although he had had the whole day to consider how he should dispose of his property, he replied, "That is the drawback"—a remark which no one appears to have understood, and of which no explanation was sought; and it was only when Mr. Torrance suggested "that Miss Argo, having been so long with him, and a faithful friend to him, that she should have it—knowing that it was his intention to give it to her"—that the testator replied: "I will leave it to her if she abide with me till the end of the chapter."

That does not strike me as affording much evidence of his mental capacity.

After writing out this bequest, he inquired what he would do with the rest of the property, but no reply is elicited, or a vague reply. The name of the plaintiff was then suggested, and he replied no, as it is said, very positively; and on Mrs. Mitchell's name being suggested, he is said to have replied, they have no need of it. After mentioning their children, with a like result, the inquiry was made, haven't you a friend in Scotland that would be better of some help? but here again the name was suggested, not the slightest matter left to the imagination or memory of the testator; and Mr. Torrance says he said, shall I make it \$200 or \$400, and the testator to that replied: "You must think I have lots of money—I am but a poor man," and then, after explaining to him, as if he were a child, that he did not deprive himself of the use of it as long as he lived, Mr. Gow suggested \$500, and the witness understood him to assent to that. The answer does not appear to have been very distinct, for the witness says it *sounded* like yes, whilst in his examination previous to the trial he says, I have no positive recollection of his

saying yes to that; he did not use a negative, and I was under the impression he had assented.

We now come to a discrepancy not only between this witness's evidence and that of the other witnesses, but between his evidence given now and on the examination before the trial.

On that occasion he said: after writing out the bequest to Agnes Strachan he returned to the room and asked what was to be done with the other property, to which the testator replied, "*there was some difficulty there;*" that Mrs. Armstrong then whispered that he intended it for the church, and I then asked if he would give it to the church: whilst on his examination at the trial he says that, in answer to the question of what he would do with the rest of his property, he made no answer, and then Mrs. Armstrong said he intended it for the church, and he then asked if he would do so.

The witness is then asked:

"Q. Why didn't you wait for his answer, and let him say himself what he meant to do with it? A. *I don't know any particular reason; I might have done so.* Q. Why didn't you? Had you any reason for not doing so? A. No; I had no reason. Q. But before he had time to answer, Mrs. Armstrong said he intended it for the church, and you asked him if he would leave it for the church, and what did he say? A. *He [she] said he had always been a friend to the British and Foreign Bible Society.* Q. Was that before he had said anything? Before he had fixed upon any scheme? A. He was talking to me and seemed to be considering. Q. How long was it before she made that second remark? A. In the course of a minute or two. Q. A minute or two passed, and then he made no answer, and then Mrs. Armstrong said he had always been a friend of what? A. The 'Home' Mission and also to the Bible Society."

The witness's recollection of his remark about the Bible Society is, "it is prospering," that of one of the previous witnesses is, either that it was that, or "it is doing noble work."

The witness then describes what occurred in reference

to the schemes of the church; that he went over all of them, and he didn't assent to any of them; and then this examination occurred:

"Q. When he [you?] first mentioned it he didn't assent, and then you went *over them all again to him*, and what did he say? A. *He first named the Home Mission and mentioned it to me.* Q. What did he say? A. *The 'Home' Mission Fund; to give it to the 'Home' Mission Fund, and the 'Foreign.'* Q. Was there a Foreign Mission Fund too? A. Yes, and the Endowment Fund of Knox College. Q. Do you mean that he mentioned all those without any further suggestion, after you had read over the schemes of the church the second time to him? Do you mean that he then stated that he would give it to the 'Home' Mission Fund and the 'Foreign' Mission Fund, and the Endowment Fund of Knox College? A. *I think he did.* Q. Are you sure. A. *I can't be very positive.* Q. Did he mention them all in one instant or at intervals? A. *A slight interval between them; a short interval.* Q. Did he speak aloud? A. *Spoke so loud that we could hear him.* Q. All the same in the room as before? A. Just the same; Miss Argo and Sandy Gow. Q. And Mrs. Armstrong and yourself? A. Yes. Q. Now are you sure that he picked out these church schemes himself? A. I am pretty certain of that. Q. Not pretty certain, but are you perfectly certain? A. *I wouldn't say perfectly certain; it is a considerable distance of time since it took place.* Q. If he didn't pick them out himself, and if you are not certain that he picked them out himself, how did they get into the Will? A. *Of course, I understood him as assenting to that.* Q. When did he assent to them; when you read over to him the scheme? A. *The second time I went over them.*"

He further states that he assented not by nodding his head, or a simple yes, but by naming the several schemes after him. It is not pretended that he named any amounts for these funds, and although Mr. Torrance does once say he asked in what proportions, he admits afterwards it was he suggested "will you make it in equal proportions."

On his previous examination he does not say that he named these, but merely acquiesced in the suggestion; this is his statement at that time.

"I went over the church schemes again. He did not assent to or pick out any. I think he understood what I said, but was undecided what to do. I then mentioned Home Mission. Was disappointed when he did not mention any thing to Aged and Infirm Ministers' Fund. I mentioned it to him among others. When I mentioned Home Mission Fund, he said, yes. Then the Foreign Home Mission Fund, I asked if he would give something to it. I did not refer to its necessities or importance. He assented, but I can't be positive as to his words. I then mentioned Knox College Endowment. I think I asked if he would leave something to that. Can't remember the language he used, but think he said, yes. I asked if he would leave in equal proportions. He said, yes, or oh yes, or something like that. I mentioned no other fund to him, and then retired and wrote that clause."

So that in answer to a question of whether he would *leave something* to each of these so called schemes, and in equal proportions, the writer of this will considered himself justified in giving not the unascertained something, but the residue of the testator's estate, of the extent of which he admits he was then ignorant, coupled with the further damnatory admission that had he been aware of the actual facts he would have used greater efforts to secure something for the relatives of the testator.

This admission appears to me to be difficult of explanation except upon the supposition that the will of the deceased could be easily moulded by those around him, and this receives confirmation from what the witness states in reference to a conversation with Armstrong on the same day. He is asked what induced him to ask the testator if he would give the rest to the schemes of the church, and he answered :

"I understood that the church was to get what he had when he died. Q. Who did you understand it from? A. It had been common rumour for a long time. Q. Tell me who told you. A. I suppose I might name Mr. Armstrong as one of those that told me about it, but it is a common thing: a common rumour as I understood. Q. Just tell me who told you it. A. *I remember Mr. Armstrong telling me.* Q. When? A. In the afternoon. Q. Of that.

same day? A. *That same day when he mentioned that if he died without a will this property would go as he never intended it.* Q. Did he tell you what he did intend? A. He mentioned at that time that he intended the lot for Esther; and that his money would go to the church."

So that it would appear that he undertook the preparation of the will with a preconceived opinion that, with the exception of the house and lot, the estate was to go to the church, and that it was based rather upon the statements of the intention of the testator derived from others than from the instructions of the testator himself; and then follows this very suggestive portion of the examination in reference to the part taken by the deceased in giving instructions for the will, which is however apparent from the other answers of the witnesses. "He himself suggested no mode of leaving the property, it was all done by me, and Mrs. Armstrong suggesting things to him and his assenting in this way."

We then come to the bequest of the furniture and books. This witness is asked:

"What did you do next? A. Mr. Davidson said there was nothing done about the furniture or books. Q. And what did you say to that? A. I went in and asked the Doctor what he would do with his furniture. Q. And what did he say? A. I followed it with saying, "*will you leave them to Miss Argo?*" Q. You didn't wait for him to answer? A. *I didn't wait for him to answer.*"

In the previous examination he states that the deceased said he would leave the furniture to Miss Argo. I then asked what he would do with the books. I don't think he answered. I said, will you leave the disposal of them to Miss Argo, and he consented. The disposal might not include the gift of them to her own use, which is the way in which they are dealt with. The witness is then asked whether the deceased did not fall into a doze in the intervals between the writing of each sentence, and denies it; but is confronted with a statement made on his previous examination.

"Q. Listen to this: 'The will was written in the dining room; I had no difficulty in making him understand it. He was sleepy. I don't think it was from failing of the faculties; he was recovering from a severe attack and very weary. We had to rouse him, and each time he had fallen into a sort of doze.' Is that right? A. Perhaps that is given the more recently, but I wouldn't think so now."

And upon further examination the witness admits, when asked whether they had not to arouse him, and found each time that he had fallen into a doze, that he thought, perhaps, that was the truth.

The witness describes the reading of the will, and states that when he read the first clause he asked the deceased if he heard it, and he said, "Perfectly, that is correct," and he did so with each clause, and he assented to all with the exception of that relating to Agnes Strachan, when he says he objected. When asked what he said, he replied:

"A. He said, *It is too much*. He made some demur, and I asked him if it was too much. Q. Now, what did he say? A. I don't remember the precise terms. Q. Did he shake his head? A. No. Q. What do you mean by "demurring?" A. He spoke. Q. Do you know what he said? A. I don't remember the precise words. Q. But he dissented? A. Dissented."

It will be seen in this, as in the other cases referred to, that although the witness first narrates the matter as if an inquiry were made whether he should make it \$200 or \$400, and he said \$200, he is obliged to admit that the deceased did not exercise any discretion between the two amounts but simply assented when the witness suggested \$200, and did not use the words \$200 at all.

And this question is then put to him: "From beginning to end he, himself, didn't mention the name of any one single devise except in answer to suggestions," to which he replied: "Suggestions made to him," and the inquiry is then made:

"Did it occur to you, in all this questioning, to try and

get him to do so? A. It didn't. Q. You just made him every sort of suggestion and everything that is in that will, and he said 'Yes.' That is the cause of that will, is it; that is the origin of that will? A. There is not one single devise in it named by himself, but all assented to by himself. Q. But not one single one named by himself? A. No. Q. Did you ever make any effort at all, anything like a persistent effort, or earnest effort, to get him to name some of them? A. I didn't. Q. You suggested everything: he said 'Yes:' you put it in? A. He understood perfectly what was doing. Q. Wasn't he perfectly capable of telling you what he wanted? A. I think so."

It is admitted then that there is no evidence of any intention on the part of the deceased to make a will until it was suggested to him by Dr. Herod.

That the deceased had the whole day after that suggestion to think over the disposition he should make of his property.

That when asked even about the disposition of the house and lot, about which he appeared to have had a very clear intention, he was unable to give any direction—meeting the inquiry by the not very intelligible reply, "that is the drawback," and was unable to make any direction until Miss Argo's name was suggested that he gave an assent with what, considering the near approach of his dissolution, must be regarded as wholly inapplicable under the circumstances, a parrot like addition of a condition "if she abide with me to the end of the chapter."

That it was only after it had been explained to him as to a child that the bequest of \$500 to Agnes Strachan did not deprive him of the use of the money during his lifetime, that he assented to that bequest—an assent which in a few moments he apparently withdrew when the will was read over, without substituting of his own motion any other amount.

When asked what he would do with the rest of the property, he replied: "I dinna ken," or "that is the difficulty," and it was only on the suggestion of Mrs. Armstrong that the church was mentioned to him. She and her hus-

band were apparently greatly exercised over the fact that he was likely to die without a will, and that his intentions would consequently be defeated, those intentions, according to their account, being to give the house to Miss Argo, and the rest to the church.

These apprehensions were on the same day on which the will was made communicated by them to Mr. Torrance, who apparently was more influenced by that communication when preparing the will, than by the assent given by the testator to his suggestion, which would scarcely in itself have warranted his construing "the giving of something" to the several schemes of the church into dividing the whole of his residuary estate equally among them, if considered alone and apart from the information given by the Armstrongs, added to which is the admitted fact that not one of the bequests originated with the deceased, but were each and every of them suggested by those around him, although the witness states that the deceased was perfectly capable of telling what he wanted.

I think it sufficient for the decision of this case to say that it is left uncertain upon the evidence whether the testator was at the time of the execution of the will of sound and disposing mind, and adopting the language of Lord Brougham, in *Panton v. Williams*, 2 N. C. Supp. 29, that there is no duty cast upon the Court to strain after probate; and not being judicially satisfied, upon a careful and accurate consideration of the evidence offered on the part of those who support the will, that the paper here produced does contain the last will and testament of the testator, I think we are bound to hold that it is not entitled to probate.

It is, I think, to be regretted that Dr. Herod, who was merely desirous that Miss Argo should be secured the house and lot which the deceased intended for her, had not prepared, or caused to be prepared, a will merely containing such a devise. It would have been difficult to impeach such a devise in the face of his previously expressed intention, and I have anxiously considered whether that

portion of the devise might not be sustained upon the authority of some of the cases; but the fact that even when asked about it he was unable, without suggestion, to make that simple devise militates against our making any exception, even to that extent, but tends to confirm the view of his utter incapacity to make a will at that time.

I have arrived at this conclusion without reference to the evidence of those witnesses whom the learned Judge regarded unfavourably; and I do so without the slightest reflection upon any of the witnesses, who may innocently enough have given to their testimony a shade and colouring, under the impression that they were really carrying out the intentions which the testator in good health had entertained, and that they have sometimes put into his mouth language which emanated from others, and ascribed to him a power of reasoning which he did not possess.

I think that the appeal should be allowed, and probate refused; but, as the Court is equally divided, the judgment below will stand affirmed.

PATTERSON, J. A.—We have unfortunately to regret that, in a considerable number of instances, it has been impossible to dispose of cases until a long time after the appeals have been heard. The delay must, doubtless, occasion inconvenience to suitors, and it certainly entails much additional labour upon ourselves; but I do not apprehend that in the present case the results have been more serious than that. We had the advantage of very thorough and exhaustive arguments, and have derived much assistance from the analysis of the voluminous evidence with which we were afterwards furnished; and from the character of the case itself it is not likely that we have overlooked any of the considerations which counsel brought before us.

For my own part, I believe I rose from the hearing with a tolerably accurate comprehension of the details of the evidence, as well as of the questions to be decided. I shortly afterwards went again through the whole evidence,

collating the portions which bore on the different topics with the aid of the memoranda prepared for us ; and now, after having had an opportunity of becoming acquainted with the views of the other members of the Court, I have renewed my examination of the whole matter, and have referred to all the authorities cited to us ; and I find myself brought by each investigation of the case to the same opinion.

I do not propose to discuss in detail either the rules of law which the decisions may seem to establish, or the facts disclosed by the testimony of the witnesses.

I do not think any useful purpose would be served by my occupying time with such a discussion, particularly as, knowing the opinions of my learned brothers, I am aware that the fate of the appeal does not depend upon the views I may entertain.

There are just two rules or principles to which I shall refer as settled by decisions either cited to us by counsel or already noticed in the judgments delivered. One of them I state in the language of Parke, B., in *Baker v. Batt*, 2 Moo. P. C., at p. 319, where he said : " And thus in a Court of Probate, where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate."

The other is, the principle which gives, as the criterion of testamentary capacity, the ability of the testator to comprehend the nature and extent of the property to be dealt with, and to distinguish and understand the claims upon his bounty which may be supposed to exist. For authoritative statement of this rule I might refer to the judgment delivered in *Wilson v. Wilson*, 22 Gr. 36, by the learned Judge whose decision we are reviewing, and to many of the cases which he collects, or which are referred to and quoted from by Sir A. E. Cockburn, in his judg-

ment in *Banks v. Goodfellow*, L. R. 5 Q. B. 549, with which should be read the summing up of Sir James Hannen in *Boughton v. Knight*, L. R. 3 P. & D. 64, and the explanation of one passage in that charge which he gave in another case as reported in a note at p. 72 of that volume.

"What I have said, and I repeat it," the learned Judge stated to the jury in the last named case, "is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then whatever is the highest degree of soundness is required to make a will. That is very different from the proposition that it requires a higher degree of soundness of mind to make a will than to do anything else. From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will."

I cannot say that my conscience is judicially satisfied that at the time when this will was made the testator was capable of considering either the extent of his property, or the claims or objects which might have been properly considered by him in the distribution of it. Had we heard nothing of the making of a will, but had merely described to us the condition of the testator on that Friday, not merely as enfeebled by the severity of his malady, for that seems not to have essentially affected his naturally vigorous intellect, but as under the immediate influence of the medical treatment which, contrary to expectation, had caused a great access of suffering, and had we been asked to form an opinion if a man in that state could be expected to turn his thoughts intelligently to a matter requiring some degree of deliberation, and a comprehensive view of

affairs, it would have been a bold thing to venture to affirm that the capacity existed. I should, for my own part, have been better prepared to look for just what the evidence before us shews to have occurred.

My view of the evidence may not quite coincide with that taken by others. I do not regard the fact that the testator, when a particular matter was brought to his notice or a particular person mentioned, understood or assented to, or even some times expressed an opinion upon, what was suggested, as by any means conclusive of capacity to grasp at the moment anything beyond the subject directly brought to his attention, or to consider that subject in relation to the larger question of the distribution of his whole property.

In one instance there is good reason to believe that the devise was substantially what the testator would, unaided by any suggestion beyond the design he had all along expressed, have embodied in any will he might have made. His intention to give the house to his house-keeper as a reward for the faithful service she had rendered to him was known, and though he did not, even as to that devise, originate the suggestion that it should be made, he assented to it, and apparently understood its character.

The reluctance one naturally feels to disturb this provision is perhaps one of the strongest points for the respondents. The legacy to the relative in Scotland, and the testator's refusal to extend his bounty to the hospital, gave occasion for evidence shewing his capacity to deal to some extent with the particular matter presented, and there is other evidence of the same sort in the reference to his sister and other relations. But all those matters were brought forward by suggestion from others, none of them originating with the testator, and nothing in connection with them, as the evidence strikes me, going the length of shewing, or strongly tending to shew, activity in his mind with regard to his affairs generally, or capacity to extend his mental vision beyond the object immediately placed before it. Indeed the circumstance of the parties engaged

in preparing the will sending to Mr. Hicks to ask the description of the property is very suggestive of consciousness that it would have been useless to ask the testator.

Then when we turn to the principal bequest, that to the schemes of the church, I am unable to find in reference to it, whatever may be said of the others, either spontaneity or volition. Whatever grounds there may be for thinking that, in making the other suggestions which Mr. Torrance made, he hit the same ideas which the testator might himself have adopted if he had been able to sit down and write a will for himself, I find nothing to lead me to conclude that he had ever intended to make a disposition of this nature and extent. It is impossible for Mr. Torrance to say that there was an intelligent understanding of the extent of this bequest, or of the effect of the answer to whatever question was addressed to the testator on the subject of it, because nothing was said about the amount of the residue; and if Mr. Torrance had put in words what was in his own mind, he would not have named nearly so large a sum as would pass under the will.

There is, to my mind, a good deal of significance against the assumption of the capacity of the testator to comprehend the disposition as a whole which he was making of his property, in some of those things which have been pressed as proving testamentary capacity, such *e. g.*, as the remark, "I am a poor man, you must think I am a rich man," attributed to him by one witness, but I believe by only one, of those who were present when the will was read over. It is said to have been made in relation to the legacy to the cousin in Scotland, and it strikes me, as the fact of the objection to that legacy does, even as made in the less accentuated way spoken of by the other witnesses, as not likely to have come from a person who understood he was making a general disposition of his property, such as in this will—particularly when considered in connection with the reply, "I dinna ken," to the question what will you do with the rest? which was put to the testator after he had originally assented to the legacy.

Incidents like those of which I take this one of the legacy as an example, might be important evidence of the exercise of his reasoning faculties, by a man who appeared to have been endeavouring to arrange the distribution, so that one object should not benefit to the prejudice of another, or so that some purpose to which he desired to extend his bounty should not suffer from needless liberality in another direction; but in the very different circumstances before us, they do not tend to convince me of the existence of the capacity which, under the doctrines to which I have alluded, ought to be established, before we can properly admit the will to probate. On the contrary their effect seems to support the conclusion the other evidence appears to me to indicate, that the condition of the testator from physical suffering and the influence of the medicines which continued to affect him, was such as to disable him from considering his affairs in a manner sufficiently comprehensive to fit him for engaging in a testamentary act; that he was not able to originate or suggest any disposition of any part of his property; and though not incapable of understanding suggestions made to him, he was not competent to consider them in relation to his property generally, or to the objects which might and properly should have been taken into consideration by him.

I am unable to say that I am satisfied we have in this document the expression of the will of the testator, except as to the one devise which carries out a purpose shewn to have been long entertained, and the legacy to Agnes Strachan.

Whether it would be competent for us, if general want of testamentary capacity were found, to admit those portions of the will to probate, is a question which has not been argued, and which I have not considered. But if justified by the practice acted on in *Billinghurst v. Vickers*, 1 Phill. 187, to which his Lordship the Chief Justice has referred, in giving relief to that extent, I cannot see my way to hold that we ought to go further.

I therefore think the appeal should be allowed.

GALT, J. —This is an appeal against the decision of Blake, V. C., establishing the will of the late Dr. Barrie, reported 28 Gr. 253. As I fully concur in the judgment of the Vice-Chancellor, I would not, under ordinary circumstances, have considered it necessary to do more than express that opinion, but as the case is one of great importance to the parties, not only as to the disposition of a considerable amount of property, but as involving serious charges affecting the characters of several of the persons who were present when the will was executed, I feel it due to them to state the grounds on which my judgment is based. The bill alleges (par. 2) "that about two days before the death of the Rev. Dr. Barrie, and while he was very weak in body, and was in the extremity of illness, and incapable of writing or of speaking intelligibly, and was utterly ignorant of and unable to understand what he was asked to do, the defendant, the Rev. Robert Torrance, of his own notion, prepared and procured the said Dr. Barrie to affix a mark, a long straight line, to a written instrument purporting to be the last will and testament of him the said Dr. Barrie; (par. 5) and the plaintiff alleges that at the time when it is alleged the said will was signed as aforesaid, the said Dr. Barrie was in his bed and had not power of body or mind to converse or decide upon matters of business, and was unable to write or to speak so as to be understood, and that he was ignorant of or incapable from mental and physical exhaustion of comprehending the contents of the said written instrument, and that the same was obtained by undue influence."

The circumstances under which the will in question was made are as follows: The testator was a very old man; he had been a minister of the Presbyterian church for a great many years; he had, owing to the infirmities attending old age, resigned his ministry and taken up his residence in Guelph, where he had purchased the house in which he died, about two years before his death; he had one sister living, who had several children and grandchildren; he was himself unmarried. It is plain from the evidence that

although there was no family quarrel between him and any of his relations, there was no family affection, as the brother and sister very rarely met, and the only person who lived with him and attended to his wants was the defendant Esther Argo, who had resided with him for thirteen years before his death, as his house-keeper. At the time of his decease he had been labouring under a disease which required surgical attendance twice a day. Until within a few days of his death, there can be no question as to his mental capacity. He was in perfect possession of his faculties, although, owing to his advanced years, he may not have been of the same capacity as when he was a young man. He had been indisposed for some days when Dr. Herod, who was his medical attendant, having made up his mind that he was not likely to get better, spoke to him on the subject of the settlement of his affairs. He states : "I went into the house, and I went into his room, and I asked him, I said, Mr. Barrie, have you made a will, which I suppose you have done ? and he said no ; and I then stated to him, I said, Dr. Barrie, do you remember a conversation between you and I, when Mr. Sandilands was upon his death bed some years ago ? and he looked up to me and said 'no.' Well, I said, don't you remember what you have said to me, how foolish it was for a man to wait till he was on his death-bed before he made his will ? 'Oh !' he says, 'I remember it perfectly well.' Well, I said, I am astonished that you have not made your will ; he says, 'It ought to have been done,' and he says, 'I want it done.' " Dr. Herod further states that the testator mentioned Mr. Torrance's name, and : "I said to him, I will come up at five o'clock in the afternoon, and I will bring Torrance with me ; and that was the words that I said to him."

It may be as well at this point of the case to state that Mr. Torrance is himself a clergyman, and had been on the most intimate and friendly terms with the deceased for upwards of thirty-three years. The witness did not see Mr. Torrance until that afternoon, when he met him in

the street, he then took Mr. Torrance to the witness's own house and left him there while he himself went to see Dr. Barrie. Upon entering the house he found a crowd of people in the house, he walked into the bed-room. "I shut the door and I went to Dr. Barrie, he was lying on the bed ; I put my face down as I usually did to his ear, and I said, well, Dr. Barrie, you know the conversation I had with you this morning about the will, are you willing to have your will made ? and he said, by all means ; he said, 'I want my will made, and it should have been made before ; I want to take and make arrangements as regards my lassie.' I supposed he had referred to his house-keeper. I said to him, who are you going to have to draw your will, and he says Torrance ; he says, he knows my affairs better than any other man." Dr. Herod then promised to bring Mr. Torrance. On returning home he found Mr. Torrance had left, so he did not return to Dr. Barrie's that night. This took place on 25th July, 1879, the day the will was made. The witness states positively that the testator was perfectly sane. The next morning about eight o'clock he saw the testator. "I went into the room and I saw him, and I said, well, Dr. Barrie, how do you feel this morning ? and he said, well, I feel pretty comfortable, and I said, what sort of a night have you had ? and he said, well, I have passed a better night, and I then said to him, did you make your will, and settle up your affairs ? and he said Yes ; he said Mr. Torrance was here and drew my will, and he says, I feel more comfortable since it is done, there is a great weight off my mind, and he says, it is all right, Torrance drew the will, and made everything right, in his bluff sort of way." To the question, did he understand what he was saying then ? "He understood just the same as he did twenty-five years ago, his mind was as clear as a bell if you only approached him right."

It appears from the foregoing that Dr. Herod was the party who originally suggested that a will should be made, but he himself was not present when it was executed. In

consequence of a conversation between Dr. Herod and Mr. Torrance, which had taken place in the morning of the 29th, the latter had told the former where he might be found during the day if he should be wanted; the conversation had reference to the fact that Dr. Barrie had not made a will, as I have already stated. Dr. Herod did not see Mr. Torrance until towards evening, when he had taken him to his own house, and left him there while he himself went to Dr. Barrie. After waiting sometime for the return of Dr. Herod, Mr. Torrance went himself to Dr. Barrie's house, passing Dr. Herod on the way. Up to this time Mr. Torrance had had no communication with the testator respecting the will. On his arrival he found Mr. Gow there, and the two persons who afterwards became witnesses, namely, Mr. Davidson and Mr. Scott. As Mr. Torrance was under the impression that Dr. Herod wished to be present when the will was drawn, a person was sent for him, but returned with the answer that the doctor would not come.

Mr. Gow was a very old friend of Dr. Barrie, having known him thirty years. He states he passed Thursday night with him, and that he suffered very much, he left on Friday morning and returned on Friday night; he was present when Dr. Herod relieved him. The following is part of his evidence:

"Had you any talk with Dr. Barrie then? No; I don't think I had. Did Dr. Herod come that night? He came that night. What was done when he came? He relieved him, and he was very bad at the time. Was there any talk then of a will that you heard? Yes; after he had attended to him, I was fixing him up; the bed was in a bad state, and I was fixing him, and he was quiet then after he got that taken away, and the doctor wanted to wash his hands, and went to wash them, and when he came back he asked Dr. Barrie if he had arranged his affairs. What was said then? And he said, no, and says the doctor, Barrie, do you want to do it, and Dr. Barrie said, yes. What was done then? Well, I don't

know if it was Mr. Barrie or the doctor then talked about getting Mr. Torrance, and I said then I would go and get Mr. Torrance. Did you judge then that Dr. Barrie understood what he was talking about? Yes; he said, yes, as plain as I am saying it now. And you spoke of hearing Torrance mentioned by one of them, and you said you would go and get him? Dr. Herod said he had left him in his house, that he had been busy about the school, and that he would go and fetch him. Well, what was done then? He went away, and I thought he wanted to come back about the will. Did Dr. Herod go away? Yes, and Mr. Torrance came in alone, he had missed him on the way, and when Mr. Torrance came in I told him that what Dr. Herod had talked to Mr. Barrie about, and I told Mr. Torrance that I thought that Dr. Herod wanted to be there himself, and we stayed for about an hour.' Mr. Davidson then went for Dr. Herod, who said, 'it was not necessary, he said he was tired, he had been out all day, and he did not consider it necessary for him to come up.' Upon receiving this answer, steps were taken to prepare the will.

Before entering on this branch of the case, it is to be observed that up to this time no person who is in any way interested in the disposition of the testator's property had had any conversation with him on the subject, and consequently could not in any degree be considered as exercising any influence whatever over him.

It may here be proper to state that the mode of leaving his property was made by suggestions to the testator. At page 40 of the evidence Mr. Torrance is asked: "Then did he himself suggest any mode of leaving his property? No it was all done by suggestions to him. He himself made no suggestions whatever as to what he would do with it? No. It was all done by you and Mr. Armstrong suggesting things to him and his assenting in this way? Yes. You got no suggestion from him, no direct suggestion of any sort or kind: is that true? Yes." This is uncontradicted, and I assume it to be substantially proved.

A will made by interrogations is valid: see *Green v. Skipworth et al.*, 1 Phill. 53. That case, in its circumstances, is very like the present; so much so that were it not, the case being accessible to any person, it is unnecessary to do so, I would transcribe it at length as decisive of the present question.

The learned Vice-Chancellor has gone so fully into the evidence that I need not recapitulate it. He had the advantage of seeing the witnesses, and has arrived at the conclusion that the deceased was possessed of testamentary capacity, and a careful perusal of the whole of the testimony satisfies me he is correct.

The person, whose conduct in preparing the will has been most assailed, namely, the Rev. Mr. Torrance, had no personal object whatever in the disposition made of the testator's property. He attended at the suggestion of Dr. Herod, who conveyed to him the desire of his old friend that he should prepare the will; and he emphatically declares that if he had not been perfectly satisfied that the deceased understood what he was doing when he was asked to sign his will, he would not have remained with him to draw the will if he hadn't been persuaded. I entertain no doubt of the truth of this statement.

There is, moreover, a circumstance attending the execution of the will which is not referred to by the Vice-Chancellor in his judgment, but which satisfies me the testator was fully aware what he was about to do when the will was presented to him for execution, after having been read over to him, namely, the attempt which he made to raise himself in his bed in order to affix his signature.

There were six persons present when the will was signed, viz., Torrance, Davidson, Scott, Mrs. Davidson, Mrs. Armstrong, and Mr. Gow.

Mr. Torrance, in answer to the question, "Did he sign his name to the will? No. Why not? I asked him when I took in the will and read it over to him if he would sign it, and he tried to get up in the bed, and I found he was so weak and his hand so tremulous, and said

never mind doctor, I will hold your hand while you sign your name."

Davidson in answer to the question, "Did he sign it himself? He took the pen, at least he touched the pen. Why did he not sign? That is a disputed question. I have understood recently that he could not—he raised himself up slightly in bed, and was propped up."

Scott gives no evidence on this point.

Mrs. Davidson (p. 20). In answer to the question, "Did you notice anything done by the doctor when they came to the signing of the will? I saw him try to get up. I noticed him that time more particularly than any other time. I was standing just at the foot of the bed facing him, and he got up on one elbow as if to try to get up, and I saw his eye very intelligent looking, and then he raised himself, and Mr. Torrance, I think, said never to mind trying to write it, if you will just make a mark, and he did it."

Mrs. Armstrong (p. 28). "How was the will signed by Dr. Barrie? He held up his hand very quick to hold the pen, and couldn't."

Mr. Gow, in answer to the question, "And then what was done? Dr. Barrie helped himself up."

When it is borne in mind that these persons were in no manner interested in the disposition of the property (except that Mr. Torrance was an executor), but, on the contrary, one of them, Mr. Gow, had been disappointed in the refusal of the testator to leave a trifling legacy to an hospital in which he felt an interest, and that they were old friends of the testator, it is to me incredible they would have been present at such a transaction if they had not been fully satisfied in their own minds that the instrument which the testator was requested to sign was in fact and in truth his will.

This appeal should be dismissed, with costs.

NEILL v. TRAVELLERS' INSURANCE COMPANY.

Leave to appeal to Supreme Court—Appeal from order granting such permission—Discretion of Judge.

Held, SPRAGGE, C. J. O. *dubitante* that an appeal will not lie from the order, of a Judge of this Court, extending the time for appealing to the Supreme Court of Canada.

Semble, *per* SPRAGGE, C. J. O., where an appeal is made from the exercise of discretion by a Judge, as in this case, the Court should not review his exercise of discretion.

After the judgment reported, ante vol. vii. p. 670, an order had been made by Burton, J. A., extending the time for appealing to the Supreme Court of Canada, after the lapse of time for doing so as of right.

Osler, Q.C., thereupon appealed from such order on the ground that the circumstances of the case were such as not to justify the granting of such indulgence.

Watson, contra.

Oct. 6, 1883. SPRAGGE, C. J. O.—My learned brothers are of opinion that no appeal lies from this order: that it is not strictly an order, but an allowance of an appeal notwithstanding the lapse of time. It strikes me that although no order is drawn up in such a case an order is really made. The shape in which it is done is not the substance of the thing done, but the mode and form only, and it is none the less a judicial act that it is not formulated in the usual mode.

The cases in which appeals have not been allowed have been placed upon this, that the order, though of a Judge of a Court, has not been in his capacity of Judge of a Court, but in execution of a duty cast upon him as a sort of commissioner, which duty might have been cast upon some other person. They are exceptional cases.

I cannot but think that the allowing of further time to appeal in this case was the act of a Judge of this Court in his capacity of Judge, and was in substance an order made

in the course of the litigation between these parties in this cause. I do not desire to say more than that this is the inclination of my opinion, and that, with great deference to the opinion of my learned brothers, I cannot free my mind from the doubts that I have expressed.

At the same time I do not mean to say that we must, or that we should, as a matter of course, entertain this appeal. The inclination of my opinion is, that where we see that the appeal is from the exercise of discretion by a Judge we should not review such exercise of discretion. In *Maude v. Lowley*, L. R. 9 C. P. 165, the question was whether an amendment allowed by Baron Pollock was in the exercise of his discretion within his jurisdiction, or whether the amendment was beyond his jurisdiction. The Court was of opinion that the learned Baron had no jurisdiction to make the order, Lord Coleridge observing (p. 171) "That is the only question before the Court; for if it is a matter of discretion, we do not, as a general rule, interfere with what the Judge has done."

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

PROVINCIAL INSURANCE COMPANY V. WORTS.

Incorporated company—Calls on stock—Notice of calls—Publication of such notice.

The plaintiffs by their Act of Incorporation were authorized to call in the stock by instalments as the directors should appoint, subject to a proviso that "no instalment shall exceed ten per cent., or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held."

Held, per SPRAGGE, C. J. O., and HAGARTY, C. J., that the times fixed for the payment of instalments need not be thirty days apart: but that instalments might be made payable at any time, provided no call exceeded ten per cent., and thirty days intervened between the date of notice of the call and the day on which it was payable.

Per BURTON and PATTERSON, JJ. A., that no instalment could lawfully be made payable in less than thirty days from the day for payment of the next preceding instalment.

*Per SPRAGGE, C. J. O., and HAGARTY, C. J.—*Notice of a call published in a newspaper in one district is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held.

BURTON and PATTERSON, JJ. A., held that the enactment as to notice ought to be construed strictly; particularly if by a literal reading of the other provision calls were held valid though payable at shorter intervals than thirty days.

THIS was an appeal by the defendant from the judgment of the Court of Common Pleas, reported in 31 C. P., at page 523, making absolute the plaintiffs' rule *nisi* to set aside the verdict entered for the defendant, and to enter a verdict for the plaintiffs.

The action was for unpaid calls alleged to be due from the defendant as a shareholder in the plaintiffs' company.

The case was argued on February 7th, 1882.*

Bethune, Q. C., for the appellants, referred to sections 11, 12, 27, and 28 of the Act (12 Vic. ch. 167) incorporating the Provincial Insurance Company. Section 27 provides that "five per cent on each share * * shall be paid in at the time of subscription, and the remainder * * in such instalments as the directors * * shall appoint,

**Present.*—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON, and PATTERSON, JJ. A.

provided that no instalment shall exceed ten per cent. on the capital stock, or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every District where stock may be held, to that effect.

In 1875, this and the other statutes affecting the Provincial Insurance Company, were consolidated and amended by the Statute of Canada, 38 Vic. ch. 82, but section 20 of that Act provides that it "shall not come into operation until adopted by a vote of the majority of the shareholders of the company present at a special general meeting called for that purpose;" and there is no proof that this has been done. At all events sections 1 and 2 provide that the Act shall not affect the existing rights of either of the parties to this suit; and it is conceded (32 U. C. R. p. 543,) that the calls now in question were not made under this Act, but under the original Act of 12 Vic. ch. 167.

(1.) The first ground of appeal is, that the appellant never became a stockholder in the respondent company.

The evidence of the defendant at page 6 of the Appeal Book, shews that the subscription for 20 of the 40 shares on which these calls were made, is not in his handwriting, but in that of Mr. Gooderham.

(2.) The second ground of appeal is, that no assessment or call has been legally made.

The Court below held that notwithstanding the clear words of the 27th section of the Act, it was sufficient to prove publication of the notice of call in the District where the appellant resided, and they distinguished the notice from the call. (See the language of Wilson, C. J., at page 544 of 31 C. P.)

For some purposes it may be true that the notice is not part of the call, *e. g.*, where the Act requires a certain interval between two successive calls, the time of the resolution making the call has been held to be the *terminus a quo* time is to be reckoned; but this depends upon an entirely different principle from that of the present Act.

Some Acts of incorporation provide that "the company

may make calls and shall give notice thereof." There the call and notice may perhaps be distinct, but in the Act now under consideration, the call does not become payable until thirty days after public notice has been given.

Here the burden of proof is clearly upon the plaintiffs to shew: (1) That notice was given as required by the statute; or (2), that it was waived by the shareholders; or (3). proof of notice to the shareholder sued may be sufficient to throw upon him the *onus* of proving that the statute was not complied with.

Here it is conceded that the statutory notice was not given.

There is no proof that it was waived, and if it were necessary for the defendant to prove non-compliance with the statute, this has been done. See the evidence of Mr. Harvey in the *Cameron Case*, quoted by Wilson, C. J., at page 528, of 31 C. P.

If the company had proved that though there had been no advertisement a notice had been posted to each shareholder, could the Court say that such a notice, although not a compliance with the statute, should nevertheless be sufficient?

The Court has no right so to modify the language of the statute, unless its requirements are so inconsistent, unreasonable or impossible, as to lead to the conclusion that it should not be interpreted according to its plain and literal meaning. Here there is no inconsistency or impossibility.

At the time this statute was passed the word "District" was well known to the law. There were but fifteen or sixteen districts in Upper Canada, and about six in Lower Canada. The effect of the statute, therefore, was to substitute advertisement in twenty-two newspapers for a personal notice, or the posting of a letter to five or six hundred shareholders.

The position taken in the Court below, that notice to the particular shareholder sued is sufficient, though no other shareholder was notified, is expressly opposed to the decision of the Supreme Court of Georgia, in the case of *Macon and Augusta Railway Co. v. Vason*, 57 Ga. 314.

The case of the *Newry and Enniskillen Railway Co. v Edmunds*, 2 Ex. 118, was relied on in the Court below as an authority against the appellants, but that case was decided upon the Imperial Statute 8 & 9 Vic. ch. 16, sec. 22, where the language is entirely different from that of the present Act. (Counsel read the section.)

Parke, B., puts his judgment on the impossibility of carrying on the affairs of the company if, in the event of a single notice going astray, the whole call would be defeated. (See his judgment at p. 121.) But the argument from the impossibility of literal compliance with the statutory requirement has no application to the present statute, where the requirement is not only not impossible, but much more in favour of the company than if the Act had, like the 8 & 9 Vic. ch. 16, required notice "to each shareholder," in order to fasten him with liability for a call.

Clearly publication in some districts is necessary to the validity of the call. Why, then, should not notice be given in every district? Where does the dispensing power of the Court begin?

The cases shew that statutory requirements of this sort must be strictly construed: *Stephens's Digest* (New Brunswick), p. 760; *Rudolph v. Inns of Court Hotel Co.*, L. T. N. S. 551, where, under a clause in the articles of association, prohibiting transfers of shares in arrear, it was held that a resolution of the directors for a call of which a shareholder had received no notice, did not prevent the transfer of his share.

3. The third point in favour of the appellants is, that the resolutions making the call and the notices differ as to date when the calls were payable—*e. g.*, the resolutions, make the 9th, 10th, and 11th calls payable on January 2nd, January 15th, and February 1st, 1872, respectively. The published notices make the calls payable on January 2nd, January 16th, and January 30th.

Robinson, Q. C. There is no appeal on this point.

Bethune, Q. C. I presume the whole matter is open.

Robinson, Q. C. The company do not wish to disturb the judgment of the Court below as to these calls.

Bethune, Q. C., resuming: Another point made by the appellant is, that the resolutions under which these calls are claimed are only a fortnight apart. We contend that thirty days must intervene between each resolution and the succeeding resolution, and that it is not enough that there shall be thirty days intervening between the resolution and the payment of the call.

The provision of the statute is intended to be in case of the stockholders, and should be liberally construed.

What would a reasonable man understand from these words: "No instalment shall become payable in less than thirty days after public notice."

5. Another ground is, that the calls were not made equally upon all the shareholders, as is shewn by the manager's circular, Nov. 22, 1871. This is, of course, illegal, but a shareholder receiving it and acting upon it would be placed at a disadvantage. See *Welland Railway Co. v. Berrie*, 6 H. & N. 416, cited in *Lindley on Partnership*, 4th ed., vol. 1, page 632, "if a call be made too soon and abandoned, the shareholders must be notified before another call can be made." This circular must be taken to be addressed to all shareholders, and if so should have been cancelled before the company could make a fresh call.

S. H. Blake, Q. C., on the same side: Mr. Harvey's evidence clearly shews that the statute was not complied with. The cases are clear that the statutory requirements to the validity of a call will be strictly construed. *Garden Gully United Quartz Mining Co. v. McLister*, 24 W. R. 744; *Re Alma Spinning Co.* 29 W. R. 133; *Macon and Augusta Railway Co. v. Vason*, 57 Ga. 314.

The 28th clause of the Company's Act of Incorporation empowers the company to sue only for such instalments as shall have been "so called in," *i. e.*, called in in the manner provided by the 27th section. This makes the right to sue dependent upon the validity of the call, which in turn depends on the strict performance of the statutory conditions precedent.

2. The calls here were unequally made, and are therefore

void: *Preston v. Grand Collier Dock Co.*, 11 Sim. 327. They discriminate as between different classes of shareholders. See resolutions of 11th December, 1871, June 30th and August 31st, 1874, and the manager's circular of November 22nd, 1871. Here are five different ways of dealing with shareholders: forfeiture, cash payment, sixty days time, one method for shareholders holding over thirty shares, another for shareholders holding less than thirty shares.

3. The calls are in excess of the amount allowed by the statute. Sec. 27 says "No instalment shall exceed 10 per cent. upon the capital stock." At that time each share in the capital stock was \$80, it was subsequently reduced by 26 Vic. ch. 58, to \$60, yet these calls were \$8 on each share, which exceeds 10 per cent.

4. If the construction of the statute adopted by the directors is correct, it virtually allows them to forfeit the stock. Five per cent. must, according to the Act, be paid at the time of subscription. The remaining 95 per cent. can be called up by instalments of 10 per cent. each, on ten successive days, provided thirty days is allowed between each resolution and the day of payment thereunder; this would enable the directors to make the whole of the capital stock payable within forty days from the date of the first resolution, which was certainly never intended. See *Gas Co. v. Russell*, 6 U. C. R. 579.

5. The resolution of August 31st, 1874, cancels all previous resolutions as to calls, including those upon which this action is based.

He also cited *Stadacona v. Mackenzie* 29 C. P. 10; *Moore v. McLaren*, 11 C. P. 534; *Brice on Ultra Vires*, 2nd ed., 641; *Cockerill v. Van Dieman's Land Co.*, 26 L. J. C. P. 203, (Ex. Ch.); *Rutland, &c., R. W. Co. v. Thrall*, 35 Vt. 536; *Lewey's Island R. W. Co. v. Bolton*, 48 Maine 451.

Robinson, Q. C., for the respondents. The case of the appellants rests wholly on the ground that notice was not given in every district where stock was held.

It therefore becomes important to inquire, what is the object of notice? It is not for the benefit of every shareholder, but only of the one who is sued. It would be absurd, as pointed out by Parke, B., in *Newry and Enniskillen R. W. Co. v. Edmunds*, 2 Ex. 118, that the affairs of the company should be brought to a standstill by its being proved that a single notice had been mislaid, and that thereby the whole call should be defeated. This view is sustained in *Shackleford v. Dangerfield*, L.R. 3 C. P. 407. See judgment of Bovill, C. J., at p. 411.) The case in Georgia does not apply here. There the defendant lived in Augusta, the Act required notice to be given in Milledgeville, and none was given; but the Court says a case in Louisiana was cited to shew that notice where the defendant lived was sufficient.

2. *Prima facie* the calls are all payable when the subscriptions are made. The statute does not require an interval of thirty days between the calls, it only requires that no call be made until after thirty days notice. The cases of *Gas Company v. Russell* and *Moore v. McLaren*, cited by Mr. Blake, depend upon statutes entirely unlike this one. The defence set up applies at all events to only a part of the claim, and the defendants are clearly liable for the balance of the eighth call (\$45) and for the ninth call.

3. As to discrimination. The general rule invoked by the appellants is doubtless correct, that calls must be made without unfair discrimination; but it is surely not contended that once the shareholders become liable the company are bound to press them all alike, and thereby risk the loss of some payments altogether. They had a right to exercise a reasonable discretion, and it is not contended that they forfeited shares in any case where the calls could have been collected, or that the extension of time given to certain shareholders was not in the interest of the whole body and of the company: *Boone on Corporations*, sec. 116; *Gilbert's Case*, L. R. 5 Chy. 559; *Lindley on Partnership*, 4th ed. pp. 627, 628, all shew what is meant by making calls equally.

H. W. M. Murray, on the same side. Advertisement in some of the districts where stock was held, would have been practically impossible. The list of shareholders shews that some stock was held in Michigan and some in Winnipeg.

Bethune, Q. C., in reply.

December 11, 1883. SPRAGGE, C. J. O.—The facts of this case are very fully stated in the judgment of the learned Chief Justice of the Court appealed from, reported 31 C. P., 523, and my brother Patterson in the judgment which he has prepared has stated so much of them, that it would be mere idle reiteration for me to repeat them.

What is dealt with in sec. 27 of the Act of Incorporation of this company, 12 Vict. ch. 167, is the proprietary stock of the company. The Legislature vested in the directors a certain measure of discretion. The whole number of the directors was eleven, and sec. 11 empowered a majority of them to make, prescribe and alter by-laws, rules, regulations, and ordinances touching the well ordering of the company, and among other things "to call in any instalment or instalments, assessment or assessments at such time and season, and times and seasons, as they shall think fit, giving due notice thereof, as hereinafter provided."

That section placed no restriction upon the exercise of the discretion of the directors, in the calling in of the stock. What restrictions are placed upon it we find in sec. 27 in the shape of a proviso to or qualification of the general power conferred. It runs thus: "That five per cent. on each share of the proprietary stock shall be paid at the time of subscribing thereto, and the remainder shall be paid in such instalments as the directors for the time being shall appoint: Provided that no instalment shall exceed ten per cent., upon the capital stock; or be called for or become payable in less than thirty days after public notice shall have been given, in one or more of the several newspapers published in every district where stock may be held to that effect."

These restrictions and these only are in terms placed upon the discretion of the directors as to the calling in of stock. It would indeed be more accurate to say that two restrictions only are imposed upon the exercise of their discretion, for the mode of notice is a thing prescribed by the Act as a thing preliminary to the call made by the directors becoming payable. The two restrictions are, one limiting the *amount* of any one instalment, the other as to the time when it shall become payable. The contention is that upon a proper construction of this proviso, a something besides what is expressed is required, viz., that no calls should be made payable at less than thirty days from each other.

I was competent to the Legislature to have left this matter of calls for the payment of stock wholly to the discretion of the directors, as we find was done in the case of this same company by the Dominion Parliament, when in 1875 its capital stock was permissively increased to a million and twenty dollars. Sec. 7 of that Act 38 Vic. ch. 82, so far as it relates to the calling in of stock is as follows: "Five per cent. on each share of stock shall be paid at the time of subscribing, and the remainder shall be paid as the directors for the time being shall appoint." Here an unfettered discretion is given to the directors.

On the other hand, the Legislature might if it had thought fit have imposed further restrictions upon the discretion of the directors than it has in terms done in the proviso referred to. It might have provided, as was done in the Imperial Act, 1 & 2, Geo. IV., ch. 63, incorporating the Stratford and Moreton Railway Company, that from time to time calls should be made upon the proprietors, as should be found necessary, "so that no such call should exceed so much upon each share; and (what is absent from the Act in question,) so that no calls should be made but at the distance of two calendar months at the least from each other;" and that twenty-eight days notice at the least should be given of all such calls by advertisement in a newspaper. (See the *Stratford & Moreton R. W. Co.*, v. *Stratton*, 2 B. & Ad. 518).

We are asked to interpret the proviso in question as containing a restriction equivalent to that which is contained in the Imperial Act, that I have referred to. The question is not whether such a restriction would be reasonable and proper, but does the proviso contain it. It is not there in terms, and I cannot find it there by necessary implication. It is a pure question of construction.

My learned brother Patterson has quoted the language of learned Judges in England in relation to the judicial interpretation of Statutes. I do not impugn them; but they do not seem to me to warrant the interpretation sought to be placed upon this proviso. I will add the utterance of one learned Judge upon this point, that of Lord Justice Knight Bruce, couched in the terse style in which he was wont to express himself. He used the language I quote in the case of *Key v. Key*, 6 D. M. & G. 84, and repeated it in *Crofts v. Middleton*, 8 D. M. & G. 216, where he says: "I adhere to what was said in *Key v. Key*, a case upon a will. In common with all men I must acknowledge that there are many cases upon the construction of documents, in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of the instrument, not to be satisfied from its contents that a literal and strict or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly." What I have quoted is to my thinking a most sound and safe exposition of the functions of a Judge in placing a construction upon an instrument, whether it be a statute, a will, an agreement or any other writing; not that all must necessarily be construed alike, for allowances must be made where a man is *inops consilii*, or illiterate, and must be made for circumstances. Still there could scarcely be a safer guide for the interpretation of writings than is furnished by the Lord Justice in the language that

I have quoted. I take it that this also should be borne in mind in the construction of instruments, that the greater the deliberation with which they are framed, and have been examined before their adoption or execution, the more likely they are to express the true and full intention of those who make them ; a consideration which applies with great force to Acts of a Legislature having two chambers. The Act in question was passed in 1848.

It strikes me that if in the passage of this Act through the Legislature it had been suggested that such a restriction should be introduced into the proviso as was contained in the *Stratford and Moreton Railway Case*, objection might have been made to such a restriction being imposed. It was a fire marine and life insurance company that was being incorporated ; and if the supposed suggestion had been made it might have been answered, that very extensive fires might occur ; or an unusual amount of marine disasters ; or epidemics of a fatal type ; that it would not do to fetter the discretion of the directors, and thereby perhaps disable them from fulfilling their engagements ; that it was a matter that might be safely left to the discretion of the directors, especially as its exercise was guarded by the requirement that six of them must concur in the making of calls while three was a quorum for the transaction of ordinary business ; and that the directors made themselves subject to the same calls as they made upon the other members of the company.

Whether this or anything like it passed in debate I have no idea. It may have been so, or the considerations that I have suggested may have occurred to the minds of members. It is sufficient if considerations existed which may have commended themselves to the minds of those who had to pass upon this question, as reasons for not restricting the discretion of the directors in the manner suggested. In the railway case that I have referred to some of the considerations that I have suggested could not, from the nature of the undertaking, have existed.

It is not necessary that such considerations as I have

suggested should be of sufficient cogency in our judgment to render proper the omission of the suggested restriction. I think that they are cogent reasons; but if I thought them very weak reasons I should still not feel warranted in going the length that it is necessary to go in this case, viz: to incorporate a restriction not expressed with those that are expressed in this proviso.

Giving to this proviso as careful a perusal as I can give to it, I am unable to say that the Legislature meant that the directors should be restricted from making calls otherwise than with an interval of thirty days between each; and that is what we must say as a matter of construction in order to hold the calls made not validly made.

I do not feel much pressed with the argument that unless the restrictions be so interpreted it was in the power of the directors to call in all the stock at very short intervals even on successive days. To recur to my illustrations of such a restriction as is contended for being suggested in debate, enforced by the argument that without it the directors might call in the instalments on successive days—and I will assume that the legislature would have regarded such calls so made as an abuse of the power conferred—it might still quite consistently refuse to name thirty days or any number of days as an interval, prescribed before hand between the calling in of instalments of stock. It might well be answered, that it was impossible for the Legislature to foresee what exigencies might arise in the course of the business of the company: that, having regard to the nature of its business it would not be safe to prescribe any interval; that it was a matter that must be left in the discretion of the directors: that it was not to be assumed that they would abuse their power, and that there were safeguards, (I have suggested some) against its abuse.

I have put the matter in this way because if by reason of such considerations as I have suggested the Legislature might, upon the arguments that have been addressed to us being suggested to them, have declined to prescribe an interval between the calling in of instalments of stock, it

is impossible to say that we frustrate the intention of the Legislature if we hold that as a matter of interpretation it is not contained in the Act.

It is only as an argument for the interpretation of the Act that this assumption, that instalments might be called in on consecutive days, is used. It has not been done in any case so far as we are informed, and I am not prepared to hold that it follows from the absence of the restriction contended for that instalments could be made payable on successive days. It is only by instalments of a certain percentage that payment can be called for: and if the calls were so made as not to be really by such instalments, it might be held that being so made they were only a colorable compliance with the Act, and in reality an evasion of it.

Upon that point, however, I desire not to express myself more decidedly. I have to add upon this branch of the case that the fact of the Act of 1875 (38 Vict. ch. 82) giving to this same company unlimited power in regard to the calling in of stock affords a strong reason against presuming that an unexpressed restriction was intended by the Legislature.

Further, it appears to me that the English Companies' Consolidation Act furnishes a powerful reason against taking as implied the restriction contended for, and importing it by construction into the restrictions which are expressed. The Act assumes that the articles of association of different joint stock companies may vary, as of course they may, and that they may vary in their provisions as to the calling in of subscriptions of stock as they may in other respects. Section 22 is one of the sections relating to that subject and runs thus: "It shall be lawful for the company from time to time to make such calls of money upon the respective shareholders in respect of the amount of capital respectively subscribed or owing by them as they shall think fit, provided that twenty-one days' notice at the least be given of each call, and that no call exceed the prescribed amount, if any; and that successive calls be not

made at less than the prescribed interval, if any ; and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any." The rest of the section is not material upon this question. The point is this: the words "if any" are used as to three of the restrictions, any of which it is assumed might be or might not be in the articles of association. One of these is, "*that successive calls be not made at less than the prescribed interval, if any,*" thus assuming that if such restriction were not expressed it would not be implied. The other restrictions might all be expressed ; but if this were not also expressed, it would not, by construction, be imported into the articles: the very point that is contended for in this case.

With deference to the judgment of the majority of the Court in *St. John Bridge Company v. Woodward*, 1 Kerr N. B. R. 29, I am unable to agree in it. At the same time I may observe that there were reasons for giving a larger discretion to an insurance company, as to the making of calls, than to a company incorporated, as that company was, for the building of a bridge, or to a railway company, as was the case in 2 B. & Ad., and as is the case in our General Railway Act of 1868 sec. 15.

The language of the proviso as regards notices of calls to shareholders is stringent ; but, at the same time, not very accurate. It provides that no instalment shall exceed ten per cent. upon the capital stock ; or be called for, or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held to that effect. In strictness a call, which is the act of the directors, must precede the giving of a notice of it to the shareholders, so that it is not correct to say that an instalment shall not be called for till after publication of notice. To give a meaning to the words used we must take them not to be used in their proper technical sense, but rather in a popular sense ; and that what was meant was that the instalments should not be made payable in less than thirty days after notice of the call by publication in newspapers.

I have examined this provision somewhat critically in order to shew that it will not bear a literal interpretation; that we must look for its object and intent not so much in the exact words used as in the general scope and purpose which we gather from its provisions, and I may here use one of the quotations of my brother Patterson, that from Lord Blackburn, "We apprehend that no precise line can be drawn, but the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will," adding, "I think, this is applicable to the construction of statutes as much as of wills," L. R. 8 Ex. 164.

Taken quite literally, the omission to publish notice of call in any one district where any one shareholder may at the time be living would absolve every shareholder from liability to answer the call. The learned Chief Justice of the Court appealed from points out the extreme inconvenience of such a construction. In support of his opinion that the want of publication can be a defence only to those where there was no publication, he says: "If it were otherwise 999 shareholders who had received such public notice could all refuse to pay because the remaining one of the 1,000 had not been so notified in his district. It might be also that the company did not know of the shareholder's address, or he might have changed it without notice, and they might not be able to discover it; and all their business would be at a standstill until they could discover it and notify him by an advertisement in the newspapers; and by that time the thirty days, and ten times that time might have passed by."

The answer made to this is, that all difficulty on that score might be obviated by publishing in some local newspaper in every district where stock might possibly be held; but there might be miscarriages in various ways, in omissions to send or to print; in errors in printing and otherwise,

and one omission or error would be an excuse to all. The necessity for the payment of a call might be very urgent; the inability to enforce it might be disastrous to the company; and disastrous also to those insured by it.

It then becomes a question whether a literal reading of this provision is consistent with the working of the company; with the carrying out of the purposes for which it was incorporated. If not there would be a sufficient reason (to use Lord Blackburn's words), for deviating from the literal sense of the words used, and not adhering slavishly to them; because to do so would defeat the intention to be collected from the whole statute.

The object of this provision is, I think, plain enough viz.: that, of the different ways of giving notice to shareholders the way prescribed should be sufficient. It might have been directed to be by that mode, or by addressing a notice to each individual shareholder. If it had been by the latter mode it would be palpably absurd to hold that an omission to notify one would excuse payment by all the rest; and none the less so though the language of the Act were *mutatis mutandis* as it is: thus, "after notice shall have been given by letter duly mailed and prepaid to each shareholder." This mode of giving notice is permitted under the idea that the notice in the local paper will meet the eye of shareholders in the district in which it is published; in short, to serve the same purpose as notices to the same individuals through the post office; and there could be no possible reason for its having a different effect. A., a shareholder entitled to a notice by mail, might object if a notice were not sent to him; but B., to whom a notice was sent, could not make the absence of a notice to A. a ground of objection to himself; and *pari ratione* where the notice is by publication in a local newspaper, if none were published in the district where A. resided he might object to pay his call; but it could not in reason be an objection in the mouth of B., in whose district the notice was duly published, that it was not also published in the district in which A. resided. I am assuming, and the con-

trary is not pretended, that B.'s liability was not increased by the omission to notify A. It is indeed apparent that it would not be: the sum he was notified to pay would remain unchanged.

Therefore, though not without some distrust in my own judgment, as it differs from that of my brothers Burton and Patterson, I come to the conclusion that neither of the grounds of objection to this case which I have discussed ought to prevail. I agree with my brother Patterson and in the judgment of the Court below upon the other grounds of appeal.

Upon the whole, my opinion is that the appeal should be dismissed, with costs.

HAGARTY, C. J.—I agree in the conclusions arrived at by the learned Chief Justice.

After directing that the stock shall be paid up in such instalments as the directors shall appoint, it is provided that "no instalment shall exceed 10 per cent., or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held."

We are asked by the appellants to add to this proviso words declaring that thirty days must elapse between the times of payment named for each call.

I am unable to see my right to deal so liberally with the words used by the Legislature.

I could only add to, or modify the literal construction, (1) to carry out what I could see was the intention of the Legislature, (2) if the words used were sufficiently flexible to admit of some other construction by which that intention could be better carried out. See *The Caledonian R. W. Co. v. The North British R. W. Co.*, L. R. 6 App. Cas. at p. 122.

I am not at all sure that the Legislature intended anything more than their language imports. Very large discretionary powers are apparently vested in the Courts as to

the construction of statutes, as evidenced by the many cases and dicta of text writers from the celebrated rules enunciated in Plowden down to Lord Justice Brett's amusing expression: "The difficulty arises from the fact of Parliament insisting upon saying that things are what they are not." * * * Cavillers may say that such nice distinctions look exceedingly like nonsense. I can only answer that if Judges seem to talk nonsense, it is because Parliament has written nonsense:" *Bradley v. Baylis* 8 Q. B. D. at p. 235. Speaking of course, only for myself, I wish the Judges always had so good an excuse.

I do not think that in the case before us it can be said that Parliament has written nonsense, or words unsuited to convey the apparent meaning of the law makers..

The Act incorporating the plaintiffs was passed in the session of 1849.

Many Acts were passed the same session, chartering various companies, and providing in all for the manner of calling up unpaid stock.

Several contain provisions not requiring any specified time to elapse between the time for payment of each call, and also Acts specifying a time to elapse. So that I assume the Legislature fully understood the language they were using.

The Canada Life Insurance Company, (ch. 168), instalments were to be paid at such time and place as directors might appoint after notice of not less than two calendar months to be previously given.

Port Burwell Harbour Company, (ch. 150), instalments of ten per cent. not less than thirty days after notice.

Sault St. Marie Mining Company, (ch. 162), general powers to make calls as provided by their by-laws—no limit.

Nipigon Mining Company (ch. 163), same effect.

Huron Mining Company, (ch. 164), another Mining Company (ch. 163), both to same effect.

Then we turn to charters of the same session in which there are restrictions clearly and emphatically expressed.

The Ontario Marine and Fire Insurance Company, (ch. 166), the Act immediately preceding this Act, ch. 167 provided for one per cent. on subscribing. Four per cent. to be ready, and a deposit to be called for by the directors as soon as they may deem expedient, remainder payable in instalments as directors may appoint, *no instalment to exceed five per cent. in any period of six months*, or be called for or become payable in less than sixty days after notice, and the company could go into business when £25,000 were subscribed for. This charter is perhaps one of the most astonishing in its liberality to shareholders, and its mercilessness to creditors that was ever passed in Canada.

When the crash came I and others may remember the woeful straits in which the creditors found themselves.

The Montreal and Vermont Junction Railway Company, (ch. 178), calls to be £5 each, and no calls but at a distance of one calendar month between each.

Ship Canal Montreal and Lake Champlain, (ch. 180), to the same effect, except that the interval should be three calendar months.

Kingston Water Works Company, (ch. 158), calls to be for instalments £2 10s., no instalment except after lapse of a fortnight from last call.

The varying provisions of these Acts, all considered and passed in the same session, should convince us that the Legislature had no general intent to always interpose a period of limitation more or less between the payment of calls.

They made no limitation in some cases, leaving all to the directors, in others they enacted periods of limitation varying from six months to a fortnight.

I think we must assume that our law makers, understood what they were enacting, and in this particular case we must assume the promoters of the Act understood their part of it.

Of the six named promoters of this Provincial Insurance Act, two of them became learned Judges of the Superior

Courts, one in the Queen's Bench, the other ultimately in this Court.

An experienced Chief Justice (Sir Nicholas Tindal, I think,) said that a man's will made by himself should be construed liberally, as he might be said to be *inops consilii*, but that it could hardly be considered that Parliament was *magnas inter opes inops*.

In one of the Acts here noticed we find a fortnight's interval considered sufficient between the payment of calls. I hardly see how the calls now in question, payable at a like interval of time, can be held to be so unreasonable that we must believe it to be contrary to the spirit, although within the letter of an Act worded as that before us.

I can see no reason for our resorting to any construction contrary to, or expansive of, the literal meaning of the words used. As to the objection arising from the alleged nonpublication in each district where there were any stockholders, I consider it to be untenable, and accept the reasons stated in the Court below and in the judgment just delivered.

I think the judgment below should be affirmed.

BURTON, J. A.—If an agreement were made between a debtor and his creditor under which the latter, upon receiving security, agreed to accept payment of \$1,000 by instalments, such instalments not exceeding ten per cent., and to be payable in not less than thirty days after notice, a layman would say without the slightest hesitation that what was meant was, that there should be an interval of thirty days between each of the instalments, and that notice should only be given after the expiry of the previous period of thirty days, and would be very apt to regard a proceeding whereby the whole debt could be called up within a period of forty days as a fraud on the surety. Whether a Court of Law would be bound to give effect to what may seem to be warranted if the contract is to receive its strict literal construction may possibly be a question,

but I think a Court would struggle against giving effect to what would be obviously a piece of very sharp practice.

The words no doubt would be capable of a construction which would admit of such a course on the part of the creditor; but the proceeding would not be dissimilar in spirit to that imputed to the Earl of Argyle, who fulfilled his promise to the Laird of Glencairns, that if he would surrender he would see him safe to England, which he carried out by taking him across the Tweed to the English bank, and hanging him at once on recrossing with him to the Scotch side of the river.

The debtor and his surety would undoubtedly understand that they were, under such an agreement, getting the full extension which ten instalments payable at intervals of thirty days would give, and the creditor must also have so understood it; and I think if I were called upon to pronounce judicially upon its construction, I should find no great difficulty in holding the creditor to what was the manifest intent and meaning of the contract; and it appears to me that the present case differs only in degree.

In private Acts of this nature, investing the promoters with privileges for their own benefit and profit, the Courts take notice that they are obtained on petitions framed by the promoters, and the language employed is treated as the language of those who asked the Legislature for them. Section 27, therefore, must be regarded as containing the terms upon which persons applying for shares would be entitled to pay for them, and must, in my opinion, be construed in the same way as we should construe them if we found them in the deed of settlement of an unincorporated company.

It appears to me, for the reasons I have mentioned and because any inference to be drawn therefrom would necessarily be purely speculative, that it would be improper to impute an intention to the Legislature to remove this restriction upon the directors in making calls, because of the nature of the proposed business and the possibility of heavy and unexpected claims arising rendering it necessary or apply to the shareholders.

One answer to such a suggestion, as it appears to me, is furnished by the fact that any restriction is left. If the Legislature had thought it necessary to provide for such a contingency we should have expected to find them leaving an unfettered discretion in the directors to call in the stock as and when they pleased; thus giving a distinct warning to persons of small means desiring to invest in such a security that it would be hazardous for them to do so.

But there is another reason why the possible necessity for raising money at short notice should not be looked at in interpreting this section, viz., that such a mode of arriving at a conclusion is purely speculative, and as Sir Peter Maxwell expresses it, "if the language admits of more than "one construction the true meaning is to be sought, not on "the wide sea of surmise and speculation, but from such "conjectures as are drawn from the words alone, or some- "thing contained in them;" and besides, in such an emergency there was nothing to prevent the company from raising money on security of the calls.

I think that the true principle for construing this section of the Act is to be found laid down in *Ford v. Beech*, 11 Q. B. 866, viz., that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole of *the agreement*, and that greater regard is to be had to the clear intent of the parties than to any particular words which they have used in the expression of their intent.

Again in *Bowerbank v. Monteiro*, 4 Taunt. 844, where an executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer to renew the bill from time to time, "until sufficient effects were received from the estate," it was held notwithstanding the generality of the words that they were not to be read literally, but that the true construction was to pay when she should receive assets legally applicable to that purpose.

Treating this section, as I am satisfied it ought to be treated, as in effect a contract between the company and

those willing to take stock in it, defining the terms on which alone calls could be made, and finding that one of these terms is, that no call shall exceed ten per cent., another that there shall be thirty days notice of each call, and that there shall not be a call for more than ten per cent. at one time, I cannot bring myself to the conclusion that it was ever intended, and that the persons who had induced parties to subscribe upon these terms should evade them, and render the contract illusory by calling up the whole within a period of forty days, for if the calls can be made as they have been they could all be made payable in that time. As Lord O'Hagan remarked in the case of *The River Wear Commissioner v. Adamson*, L. R. 2 App. Cas. at p. 758: "We must take care that a hard case shall not make bad law, but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant without coercive necessity."

But if a strict literal meaning is to be given to some of the words of the proviso, then I think a similar rule will have to be applied in construing the remainder of the restriction, and the shareholder may well be heard to say, it is possible that such a construction as you contend for may be open under the peculiar wording of this enactment, and you may be strictly within its meaning when you gave notices which call up the whole stock within forty days, but I am at least entitled to have that notice given in the manner prescribed by the Act.

If the view be correct that no one can raise the objection but a shareholder who resided in the district where no publication took place, those who have received a proper notice of call may be called upon to pay all the liabilities of the company without having any recourse against the other shareholders, whose liability to pay has never become perfected.

This would rather seem to indicate that what the draughtsman had in view was that all should be placed on the same footing, and that a notice so published as the Act directs should dispense with any other more formal notice

to the shareholders. If this proviso had been until after notice in the *Official Gazette*, would it be any answer to say, but you had actual notice served upon you and therefore as to you such a publication would be a mere form; or if the requirement had been that publication should be in the *Official Gazette*, and in the *London Times*, a publication in one only, or a substitution of a notice by letter to the address of the shareholders would be clearly insufficient. I am unable to see any distinction in principle between such a case and the present, and I think the objection a valid one.

For these reasons I think the appeal should be allowed, with costs.

PATTERSON, J.A.—This is an action to recover the amount of several calls upon stock held by the defendant. The dates of the resolutions making the calls, and the dates at which the calls were by the resolution made payable, are as follows:

Resolution of 13th November, 1871, made call payable 2nd January, 1872.

Resolution of 27th November, 1871, made call payable 15th January, 1872.

Resolution of 4th December, 1871, made call payable 1st February, 1872.

Resolution of 11th December, 1871, made call payable 15th February, 1872.

Resolution of 18th December, 1871, made call payable 1st March, 1872.

Resolution of 26th December, 1871, made call payable 15th March, 1872.

Resolution of 2nd January, 1872, made call payable 30th March, 1872.

Resolution of 8th January, 1872, made call payable 15th April, 1872.

Each call was for ten per cent. of the stock, except the last, which was for three dollars per share, which was less than two per cent.

Notice of these calls was given by advertisement in newspapers. Copies of the advertisements from the *Leader*, a newspaper published in Toronto, were put in evidence. One of them is dated 1st December, 1871, and gives notice of the first two calls, but describes the second as payable on the 16th day of January in place of the 15th. Another advertisement, dated 12th December, contains notice of two further calls, but gives the 13th of January as the day on which the first of those two was payable, whereas the resolution named the 1st of February; and a third advertisement, dated 17th January, 1872, gives notice of the four remaining calls.

A number of objections were urged in the Court below against the defendant's liability, and four or five of them have been renewed before us and argued with more or less confidence.

It will be found that the only questions requiring much discussion are two which touch the original validity of the calls. Before approaching them I shall briefly allude to the others.

One of them is founded upon two documents which are in evidence, viz., a circular dated 22nd November, 1871, addressed by the manager of the company to stockholders, mentioning the call made on the 13th November, intimating the intention to call in all the capital stock within six months, and referring to special arrangements offered to persons holding more than twenty shares, and to the willingness of the directors to extend time for payment of some calls for a period of two years; and a resolution passed on 31st August, 1874, at an annual meeting of shareholders, which contained instructions to the directors as to collecting unpaid calls, and authorized the giving of time for paying calls on shares above the number of thirty held by any one person, and which resolution concluded by saying that all previous resolutions in reference to stock be rescinded, saving to the directors the right to deal with any special cases as they might deem just.

It was argued that all shareholders were not equally

dealt with, exceptional favor being shewn to holders of upwards of thirty shares—a class, by the way, which included the defendant—and that therefore the calls were void.

This point was taken by both the learned counsel who supported the appeal, but I believe Mr. Bethune relied only upon the transaction of November, 1871, while Mr. Blake sought aid also from the resolution of August, 1874. The answer given to the objection in the Court below was, I think, quite conclusive. No inequality was shewn to have in fact existed. The calls were made applicable to all shareholders alike, and the consequence of an attempt to shew undue favor to one class would not have been to vitiate the call as to the others, but to give them a right to ask the interference of the Court to enforce the same rule against all. That was the nature of the relief the right to which was affirmed by Sir L. Shadwell in *Preston v. Grand Collier Dock Co.*, 11 Sim. 327.

It was further urged that the resolution of August, 1874, by rescinding all previous resolutions in reference to stock, in effect cancelled the calls the enforcement of which was the very purpose of the resolution. I shall not attempt to add to what was said on this topic by the learned Chief Justice of the Common Pleas, more than the one remark, that the annual meeting was not dealing with the resolutions of the directors by which the calls had been imposed, but only with previous resolutions of the shareholders, such, *e. g.*, as the one referred to in Mr. Harvey's circular of 22nd November, 1871, by which a meeting had adopted a report recommending terms like those offered in the circular, which were not the same terms authorized by the meeting of 1874.

The authority for making the calls was that conferred upon the directors by the Company's Act of Incorporation, 12 Vict. ch. 107. The eleventh section of that Act gave power to a majority of the directors to "call in any instalment or instalments, assessment or assessments, at such time and season and times and seasons as they shall think

fit, giving due notice thereof as hereinafter provided. And section 27 further enacted "that five per cent. on each share of the proprietary stock shall be paid at the time of subscribing thereto, and the remainder shall be paid in such instalments as the directors for the time being shall appoint: provided that no instalment shall exceed ten per cent. upon the capital stock, or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held to that effect."

To the facts which I have stated respecting the making of the calls in question I have now to add, that it appears from the evidence of Mr. Harvey, the manager of the company, that notices of the calls were not published in any newspaper in some of the districts where stock was held. Besides those in the Leader he said he knew of advertisements in Montreal and Ottawa, and thought he knew of advertisements in Prescott and Kingston; and that he wrote to the shareholders, in Goderich and other places, to waive publication in their districts. He had directed notices to be sent to every shareholder, and had the notices printed; but there was no evidence, either by oral testimony or by any office entry or otherwise, of the actual sending of notices. The stockholders, as Mr. Harvey is reported to have stated, lived in all places from Goderich to Sarnia, and in Montreal. There is evidently an error, in the note of his evidence, as another officer of the company testified that they lived all over the Province in 1871, and lists of stockholders, produced by Mr. Harvey, shewed that in 1869 and 1872 stock was held by residents of ten or twelve of the twenty districts into which Upper Canada was divided when the company's Act was passed, as well as by residents of Montreal and of places outside of the Province of Canada.

It is objected that the calls could not be legally made unless at least thirty days elapsed between the days of payment of each two consecutive calls; and that because

the calls now in question were payable at shorter intervals, all except the first of the series were upon that ground void: secondly, that the omission to publish notice in all the districts vitiated the whole series: and thirdly, that the variance between the notices of two of the calls and the resolutions must be fatal to those two.

This last objection is conceded on the part of the company. It was so held in the judgment delivered in the Court below, but apparently by inadvertence the rule was drawn up to enter a verdict for the full amount.

While speaking of the amount I may mention that a further objection which was taken by Mr. Blake, that the calls of ten per cent were computed on the original capital of \$80 a share instead of the reduced amount of \$60, seems not to be supported by the figures in the particulars and in the rule.

This brings me to the substantial question of the validity of the calls under the statute, and that question is by no means free from difficulty.

The learned Chief Justice of the Common Pleas has, in his very carefully considered judgment, pointed out that, under the construction of the statute for which the respondents contend, and to which he felt himself compelled to give effect, ninety per cent. of the stock might be made payable in nine consecutive days, or even upon the same day. He says it was probably not intended by the Legislature to grant such a power to the directors. I should say that if such a construction can be maintained, the reference in the statute to the limitation of calls to ten per cent., and that payable only after thirty days notice, is most delusive and deceptive.

No one, who was asked to subscribe for stock under the protection of such a statute would for a moment imagine that during any period of thirty days he could be required to be making provision for the payment of more than one call. A man knowing his means and his ability to lay by a part of his income might subscribe for shares, by way of an investment of his savings, on a computation of the

amount he could reckon upon making up if he had thirty days notice, and suddenly find himself involved in difficulties by finding a demand many times greater than his reading of the law had led him to think possible. Of course, if such is the true force of the statute, the hardship must be submitted to; but before conceding that a hardship so great was intended by the Legislature, it must be very clear that the construction is necessary and proper. I put an extreme case, but if the statute has fixed an interval which must elapse between calls, the full interval is the right of the shareholder. If it prescribes thirty days for the payment of ten per cent., it would be a glaring breach to require ninety per cent. in that time, or in that time with a merely colorable addition; but the statute would be equally violated, though the hardship might be less, by demanding ten per cent. in twenty-nine days.

This statute belongs to the class to which the maxim applies *verba chartarum fortius accipiuntur contra proferentem*, the language being treated as that of the promoters of the undertaking rather than that of the Legislature; and parties contracting with the company in the terms thus put forward by the company have a right, as in other contracts, if ambiguity exists, to hold the company to that particular sense of the contract in which they believed the company to have accepted their promise. See cases collected in *Broom's Legal Maxims*, under the maxim quoted.

In *River Wear Commissioners v. Adamson*, L. R. 2 App. Cas. 743, the principles on which *quasi* private acts should be construed were a good deal discussed, and instructive judgments were delivered by Lords Cairns, Hatherley, O'Hagan, Blackburn, and Gordon. Lord Blackburn quoted from the judgment which he had delivered as the judgment of the Exchequer Chamber in *Allgood v. Blake*, L. R. 8 Ex., at p. 164, where he had said: "We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not

adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will." And he added: "My Lords, *mutatis mutandis*, I think this is applicable to the constrution of statutes as much as of wills."

One remark made by Lord O'Hagan was, (p. 758) "We must take care that a hard case shall not make a bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant without coercive necessity." A similar remark was made by Lord Blackburn, who said, (p. 770) "There is a legal proverb that hard cases make bad law; but I think there is truth in the retort that it is a bad law which makes hard cases. And I think that before deciding that the construction of the statute is such as to work this hardship, we ought to be sure that such is the construction, more especially when the hardship affects not only one individual, but a whole class." In the later case of *Caledonian R. W. Co. v. North British R. W. Co.*, L. R. 6 App. Cas. 114, in which the Courts successfully struggled against the literal construction of a statute for which one party contended, Lord Blackburn made observations of the same tenor as those I have read, and Lord Selborne said, (p. 121) "There is always some presumption in favor of the more simple and literal interpretation of the words of a statute or other written instrument * * The more literal construction ought not to prevail if it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

I refer to these dicta as authorities for looking beyond the mere letter of the enactment where necessary in order to avoid an effect which it may seem that the Legislature cannot have intended. In the judgments delivered in the cases I refer to will be found many other passages on the same subject, in some of which the duty is pointed out to construe a statute or contract according to the natural

grammatical import of its language where that is free from ambiguity, and the tendency of different minds to form different conceptions of the object and intent of a document is also given weight to; but with whatever caution the general doctrine and the primary duty to look only to the language employed may be stated, there is no difference of opinion as to the right and even the duty of a Court to prefer the construction, if the language is fairly open to it, by which the apparent object may be secured and injustice avoided. I therefore do not propose to make any further allusion to these judgments beyond one reference to the argument of Lord Blackburn, where (in 2 App. Cas. at pp. 766,) he alludes to the difference between local and personal Acts, which are framed according to the views of the promoters' counsel, and general Acts; and lays it down as his opinion that a Court is to some extent justified in putting a different construction on the words of an Act passed at the instance of particular promoters (or, as he says it is commonly called, an Act, local, personal, and public) from that which would be put on similar words in a general Act.

In my judgment the intention of the Legislature to be gathered from the proviso to this section 27, or what may be a stronger way of putting it, while under the circumstances a legitimate way, the representation made to subscribers for stock in the company, is that only one instalment shall, during any period of thirty days, become payable, and that such instalment shall not exceed ten per cent. of the stock; or, in other words that thirty days must elapse between the days fixed for the payment of any two consecutive instalments. It would not be inconsistent with this to make calls on the same day for several instalments, each not exceeding ten per cent., provided the days of payment were fixed not less than thirty days apart, for there would in that case be thirty days given to provide for each payment, which I take to be the essence of the representation. On any other conception of the meaning of the Legislature no reasonable explanation suggests itself

to me for the combined limitation of the amount of the calls and the notice to be given.

The language of Parker, J., in giving his judgment in the Supreme Court of New Brunswick in a case to which I have to refer, may be adopted as very applicable to this matter. "It is," he remarked, "without doubt that the Legislature have prescribed that the directors shall not call for *ten per cent.* without thirty days' notice, and shall not call for more than *ten per cent.* at any one time. Does it seem consistent with these restrictions to leave them at liberty to call for *ninety per cent.* in forty days when they cannot call for ten in less than thirty, and to call by one notice for nine consecutive daily payments of ten per cent. each when they cannot, under any circumstances, call for more than one ten per cent. in any one day?"

I am prepared to hold that we may, without unjustifiable violence to the language, construe it in the way the appellant contends for, and to hold that none of the calls were authorized which were payable at intervals of less than thirty days from the next preceding regular call.

A more strict or literal reading of the statute would, in my opinion, frustrate the intention of the Legislature, and would merely illustrate the maxim *qui hæret in litera hæret in cortice*.

But if it is considered unjustifiable, as it was considered in the Court below, to depart from the strict force of the words of the Act, we have to pass on to the other question, namely, the necessity for publication of notice of the calls in every district in which stock was held.

I understand the word "district" to refer to the territorial divisions which existed in the Province of Canada when the Act was passed, and which in Upper Canada were not superseded by the division into counties until the beginning of the following year.

It may not have been contemplated that this provincial company would number amongst its stockholders persons who lived outside the limits of the province. However that may be, the only fact necessary for our present inquiry

is the fact that notice was not published in all the districts of the province.

The statute is very express in the enactment that no instalment shall be called for or become payable in less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held.

We have here just what was absent from the statute under which *Newry and Enniskillen R.W. Co. v. Edmunds* 2 Ex. 118, was decided, although that is not all the difference between that statute and the one we have to construe. I allude to that part of the judgment of Parke, B., at p. 121, which is quoted by the learned Chief Justice in his judgment in the Court below, but I read the passage, which did not appear important to his Lordship, and the place of which is marked by asterisks in the report of his judgment. "That construction," the learned Baron said, "would be fraught with such evil consequences, that I think it impossible (putting a reasonable interpretation on the Act of Parliament) to say that the Legislature intended that what they have not expressly declared, but which is only implied, should amount to a condition precedent."

Here the Legislature has declared in terms as express as could be used, that the publication of notice in every district shall be a condition precedent to the call being payable.

I see no good reason for assuming that to require strict compliance with this provision would be fraught with evil consequences, or likely to defeat the working of the company. The districts were not numerous, only one newspaper in each was required to contain the notice, and not more than one insertion was exacted. If any doubt existed as to where the stock was held, it would have been no impossibility, nor much of a hardship, to publish notice in every one of the districts in the Province.

The great point is the express enactment. If we depart from its terms, what is to be substituted? The only alternative seems to me to be to read the law as merely

requiring that the stockholder who is asked to pay shall himself have had notice of the call, and as declaring that notice published in the district where he lives shall be deemed to be notice to him.

The difficulty is, that the statute has not said this, and it cannot be affirmed that there may not have been reasons which influenced the Legislature in passing the statute just as we find it. Amongst other things, it may have deemed right that, as no one became liable to pay till he had notice, there should be no power to fix a portion of the stockholders with a liability that was not shared by all the others.

The cases cited to us of *Macon and Augusta R. W. Co. v. Vason*, 57 Georgia Rep. 314, and the case in New Brunswick, *St. John Bridge Co. v. Woodward*, 1 Kerr 29, are very much in favour of the contention of the appellants. This last case is a decision on a statute very much like the one before us, and the judgment of the majority of the Court commends itself to me as properly construing the law.

Then I cannot overlook the consideration, that if we apply the same principle to this provision respecting notice which was applied in the Court below, and is now contended for by the respondent as applicable to the question of the intervals between the calls, we are bound to give its direct literal effect to the language used. The same rule should govern the construction of both provisions; and by applying the same rule, whether that of adhering to the letter or that of giving effect to the apparent intention, to both provisions alike, the conclusion seems to me a matter of necessity that the defendant never became liable, either because the calls were not at sufficient intervals, or because the pre-requisite of the publication of notice in every district failed.

If the appellant is entitled to succeed only on the first ground, I should follow the judgment of the Supreme Court of New Brunswick, and hold him liable for the first call, which was payable on 2nd January, 1872, and for

two others which were payable after the proper thirty days interval, viz.: on the 15th February and 30th March and not liable for the rest. It is said that he owed \$34 irrespective of these calls, and if so the plaintiffs are of course entitled to recover for that sum.

But if the appellant succeeds on the second ground, his liability is reduced to the \$34 only.

In my opinion we should hold that to be the result, and should allow the appeal, with costs, and discharge the rule in the Court below, or reduce the verdict to \$34, if I am right in supposing that debt to be admitted or proved.

HARVEY V. HARVEY.

Action by creditor against shareholder—Irregular judgment—Process not duly served—Plea of fraud.

In an action by a creditor against a shareholder for unpaid stock, in a company incorporated under 32-33 Vict. ch. 13 D., *Held*. [BURTON, J., dissenting,] that the shareholder under a plea that the judgment was obtained by fraud was entitled to set up as a defence that the company had not in the original suit been served with process, under section 50. the person served as secretary not being such officer.

Per BURTON, J. A. Such an omission was an irregularity only which must be moved against promptly, and could not be the subject of a plea; but that fraud or collusion between the plaintiff and the company or its officers, would avoid the judgment, and could be set up by plea, but was not shewn by the evidence here.

THIS was an appeal by the plaintiff against the judgment of Armour, J., pronounced in this action 20th May, 1882, whereby he dismissed the plaintiff's claim, with costs; and came on to be argued on the 6th of September, 1883.*

McCarthy, Q.C., and *Bruce*, for the appellant.

Robinson, Q.C., and *E. Martin*, Q.C., for the respondent.

The facts of the case, as also the points relied on, and the cases cited, appear in the judgments.

September 21, 1883. PATTERSON, J.—I agree that the defendant has been shewn to be still the holder of four shares of unpaid stock in the Canada Sewing Machine Company, Limited.

The only question with me is, the plaintiff's right as a judgment creditor of the company.

He has a judgment entered up, but the defendant pleads that he obtained it by fraud and covin.

We are told the argument, at the close of the case in the Court below, proceeded on the understanding that the action should be decided on the whole facts, irrespective of the form of the pleadings. Therefore, when the learned Judge noted that he found the issue joined upon the fourth

**Present*—SPRAGGE, C.J.O., BURTON, PATTERSON and MORRISON, JJ.A.

plea, which was the plea of fraud, in favour of the defendant, I understand him to mean that facts were shewn which in the view of the Court constituted fraud in the recovery of the judgment, for which the defendant had a right to ask the Court to treat the judgment as a nullity, whether or not those facts would have established the allegation of fraud and covin as those words were understood in pleadings at common law.

The statute under which the company was incorporated was the Dominion Act, 32, 33 Vict. ch. 13. The fiftieth section provided that service of all manner of summons or writ whatever upon the company might be made by leaving a copy thereof at the office or chief place of business of the company with any grown person in charge thereof, or elsewhere with the president or secretary thereof; or if the company had no known office or chief place of business and had no known president or secretary, then, upon a return to that effect duly made, the Court should order such publication as it might deem requisite to be made in the premises, for at least one month, in at least one newspaper; and such publication should be held to be due service upon the company.

The judgment now in question was obtained by the plaintiff by default for want of appearance, and the charge made by the defendant is that no process had been served upon the company.

A writ of summons had been issued at the suit of the plaintiff against the company. It was served on the 5th February, 1880, upon a Mr. Charles R. Smith, and on 16th February the judgment was signed.

Mr. Smith had been secretary of the company. The letters patent incorporating the company bear date 4th November, 1872. Mr. Smith had been appointed secretary in the previous July, and his appointment was renewed every year down to 31st December, 1877, at a yearly salary, which, from 1873, had been \$2,000.

There was a meeting of the shareholders of the company on 18th December, 1877, at which I understand there was

an appointment of directors for the ensuing year, and either then or a few days later, I think on 31st December, Mr. Dewar was, by the directors, appointed president, and the plaintiff vice-president of the company.

At the meeting of 18th December a report was received from the retiring board of directors, recommending that power should be given to the board elected that day, in the event of being unable to raise sufficient money to carry on the business, to adjust, wind up and settle the company's business, and in doing so to make sales of the assets, business and goodwill of the company, either *en bloc* or as they should think fit; and at a meeting on 31st December, 1877, which seems to have been an adjournment of that of the 18th, that report was adopted.

Then, on 11th March, 1878, the plaintiff and a Mr. Watson were appointed by a resolution of the board to wind up the company's affairs.

Mr. Watson was one of the directors.

A deed was made, which is in evidence, bearing date 8th March, 1878, but not executed, as I assume, till after 11th March, between the company of the first part, Mr. Dewar of the second part, Mr. Watson of the third part, the plaintiff of the fourth part, and the Consolidated Bank of Canada of the fifth part. We have in evidence the following extract from the minutes of a meeting of the board of directors on 11th March, 1878.

"Moved by James Watson, seconded by Alexander Turner, that having heard read the agreement between the company and the Consolidated Bank, and Messrs. A. Harvey, Dewar, and Watson, this board approves of same and authorizes the due execution thereof by the company."

"Moved by James Watson, seconded by Alexander Turner, that Messrs. A. Harvey and James Watson be a committee to carry out the terms of the report adopted by the shareholders at their last annual meeting, as to winding up the company and disposing of the assets thereof, regard being had to the terms of the agreement referred to in last motion."

The deed of 8th March makes arrangements concerning

debts due by the company to the other parties to the deed, and some arrangements amongst those parties themselves, and provides for the disposal and application of certain assets which it vests in the plaintiff and Mr. Watson for the purposes of the deed. It does not shew that these were all the assets of the company, and it does not contain provisions for any general winding up of the company's affairs. It will be sufficient, by way of further reference to it and to the circumstances of the company, to read the following passage from the plaintiff's deposition :

"The company were not able to meet their engagements when this deed of the 8th of March, 1878, marked A., 19th October, was executed. There was another document between the company and their creditors to accept certain sums for their claims less than the full amounts. I cannot tell whether all the creditors were to accept the same rateable proportion of their claims ; Plummer Dewar was a creditor of the company. I can speak as to Watson, who was also a creditor. I was also a creditor, and so was also the Consolidated Bank. There is no other arrangement respecting my claims against the company beyond what is embraced in the exhibit A., 19th October ; and I believe that the exhibit A., 19th October, embraces all the agreement between the bank and Watson and Dewar and the company. The creditors of the company other than those mentioned in the deed A., 19th October, agreed to accept a composition for their claims less than the full amount."

After 11th March, 1878, no meeting of the shareholders of the company was held, and nothing was done in the business of the company except by the plaintiff and Mr. Watson, who as trustees proceeded with the winding up of the affairs, Mr. Smith acting as their secretary.

It would, as it strikes me, be doing violence to the plain effect of the evidence to hold that in February, 1880, Mr. Smith was secretary of the company. I suppose the corporate existence of the company remained, but it had long ceased to have a place of business, or any business, and I have no doubt that the proper understanding of the appointment of Mr. Smith as an officer of the company is that it expired on 31st December, 1878.

He may have had charge of books of the company—that is, they may have been in his care while he was acting for the trustees—but he was no longer secretary of the company.

Mr. Dewar, the president, died before 1880. Therefore in February of that year the company, while still a legal entity, had no known office or chief place of business, and had no known president or secretary, and process could only be regularly served under an order of Court, as provided by section 50.

The plaintiff was a creditor of the company, as was decided by the learned Judge at the trial, when he found in his favour on the issue taken upon the third plea.

The defendant owed the company in respect of the four shares of stock. That was a debt which the plaintiff and his co-trustee might have taken proceedings to enforce for the benefit of the creditors on whose behalf they were supposed to act; but owing to some difference of opinion between the trustees, or some other reason, they did not take steps to enforce payment.

Still it was an asset to which the plaintiff was at liberty to resort if he could put himself in the position mentioned in the forty-second section of the Act, by recovering judgment and issuing a *fi. fa.*

Therefore the summons was issued in February, 1880, and served on Mr. Smith. Having received the plaintiff's writ, he went to the plaintiff and Mr. Watson, his co-trustee, for instructions. They met at the plaintiff's office but gave no definite instructions. That was on 6th February. Mr. Smith saw them both every day till the 16th, but received no instructions, and on the 16th the plaintiff signed judgment for want of appearance.

Mr. McCarthy in his argument for the plaintiff spoke of his proceedings as taken simply with the object and desire to recover judgment without particular reference to the present defendant, and one of the formal grounds of appeal is framed so as to convey the same assertion, although cautiously worded so as merely to disclaim the intention of

prejudicing the defendant or any other person. The plaintiff himself takes no such position in that part of his deposition which is in evidence, but on the contrary shews satisfactorily that there could be no motive for proceeding to judgment against the company except to have recourse against the defendant, and perhaps also against another gentleman who is said not to have paid up for his shares.

Two questions have been discussed, one touching the mode of proceeding to attack a judgment alleged to have been fraudulently obtained, the plaintiff contending that it can only be by motion to the Court, and not by plea in the action against the shareholder. I shall notice some authorities bearing on this contention, and then consider the other question, which is one of substance, namely, whether the alleged fraud has been established.

Fowler v. Rickerby, 2 M. & G., 760, was a proceeding by *sci. fa.* against members of a banking co-partnership, upon a judgment recovered against Marston, sued as the public officer of the company. There was a plea that *at the time of the alleged recovery* Marston was not one of the public officers of the said persons united in co-partnership, *concluding to the country*. This plea was held bad on special demurrer, because it only denied Marston's status at the time of the recovery of the judgment, admitting his appointment as public officer, and that he was sued in that character, and not shewing how he had ceased to be public officer, which would have been an allegation of new matter which ought to have concluded with a verification. Nothing is said to the effect that the defence was not a proper subject for a plea. The language of Tindal, C. J., is rather the other way.

In *Bradley v. Eyre*, 11 M. & W. 432, the *sci. fa.* alleged that judgment had been recovered against Brettell as secretary to the company. A plea denying that he was secretary, and concluding to the country, was held bad as professing to traverse an allegation not found in the declaration. There may be a doubt whether Parke, B., who delivered the judgment of the Court, intended to express

the opinion that the proper remedy was by plea or by motion, or whether he thought there was a choice between the two. He speaks of both in this way: "Unless the proceedings are against a person who was secretary at the time of the commencement of the suit, the judgment is erroneous and irregular. * * If any advantage could be taken of the argument that Brettell was not secretary at the time of the commencement of the suit, the defendants ought to have raised it by a proper plea. It is enough to say there is no such plea. In point of fact, this is a mere proceeding for enabling a creditor to obtain his debt from the shareholders; and even if the person sued was not secretary, my notion is that the company are still bound by the judgment. If the nominal party collusively suffers judgment to be entered against him, and the shareholders are taken by surprise, they should apply to the Court to set aside the proceedings. It is sufficient to say that upon this record the plea affords no answer." As I understand the dictum, it is that the defence that the action was against one who was not secretary is the proper subject of a plea; but if the right person were sued, and collusively suffered judgment, the remedy might be by motion. The learned Baron alludes further on in his judgment to a circumstance which must be borne in mind in attempting to apply these decisions respecting actions against the public officers of English companies to actions against corporations, and that is that all the partners were parties or privies to the action against their officer.

Bosanquet v. Graham, 7 Jur. 831, is an instance in which the defendants on a *sci. fa.* moved against a judgment as collusively obtained, and also on the ground that Graham, against whom it had been recovered, was not the public officer of the company. The motion was entertained. Lord Denman alluded to *Fowler v. Rickerby*, which had been cited as shewing that collusion could not be pleaded to a *sci. fa.* and added that the Court did not put that construction on the words of Tindal, C. J.

In *Philipson v. Earl of Egremont*, 6 Q. B. 587, the

plea contained an allegation which would not be supported in the case before us, as far as we are now at liberty to say. It alleged that the judgment against Bleaden, the public officer of the company, was recovered in respect of a demand for which the company were not by law liable; and that Bleaden fraudulently and deceitfully, by connivance with the plaintiff, suffered judgment to be recovered in order to charge the defendant. "Now if these allegations be true," Lord Denman, C. J., remarked, "the defendant certainly ought to have some remedy; and the question is, whether that remedy is by pleading as he has done, or by motion to the Court. We are far from saying that the latter course was not open to the defendant. Fraud, no doubt, vitiates everything; and the Court, upon being satisfied of such fraud, has a power to vacate, and would vacate its own judgment, as is suggested in *Bradley v. Eyre*, 11 M. & W. 450. But still such a plea as the present may be good; and indeed we find, in *Fowler v. Rickerby*, 2 M. & G. 760, that Tindal, C. J., stated that it would be good. If the plea had alleged a fraud practised on the original defendant, it would have been open to the answer already made to the fourth and sixth pleas; (i.e., that it might have been pleaded to the original action)—"but as it alleges fraud and collusion between the plaintiff and the defendant in the action for the purpose of charging the present defendant, there was no opportunity for him to plead it before." One material difference between this case of *Philipson v. Earl of Egremont* and the case before us is, that in the English case the proper person had been sued as public officer. The plea was a plea of fraudulent collusion between two persons who were proper parties to the suit. It is, therefore, an authority that fraud in obtaining judgment is the proper subject of a plea, but does not touch our present inquiry any more closely.

The rule which permits a plea to an action on a foreign judgment is analogous to what is contended for here.

The case cited to us of *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, is a recent instance in which the defence was that

the foreign Court had been misled by the fraud of the plaintiff; but it only reasserted the familiar doctrine which is thus expressed in the judgment of Lord Campbell in *Bank of Australasia v. Nias*, 16 Q. B., at p. 735: "Doubtless it is for the defendant to show that the foreign Court had not jurisdiction of the subject matter of the suit, or that he never was summoned to answer and had no opportunity of making his defence, or that the judgment was fraudulently obtained."

In the cases I have thus referred to there is ample authority for holding that fraud or collusion in the recovery of the judgment in the original action may be pleaded in the action against the shareholder. We are concerned more with the fact than the form in which the question is raised; yet I cannot help feeling that some confusion has arisen from not keeping clearly in view what the question really is. It is not, as I apprehend it, whether Mr. Smith did or did not retain his position as secretary of the company—at least that is not the form of the issue. The real issue is, whether or not the plaintiff induced the Court to give judgment in his favour against the company by representing that the company had been served with process and had made default, when the fact was, that no service such as the law could recognize had been made. The question of the status of Smith is only incidental to the inquiry whether the company was before the Court when judgment was given against it.

In the view I have expressed of the position of Mr. Smith as not being the secretary of the company for the purpose of receiving service of process under section 50 of the statute, the case is the same as if the service had been upon a stranger, who was represented to the Court as being the secretary for the purpose of leading the Court to believe there had been a valid service on the company. In that case the Court would clearly have been misled for the purpose of obtaining the judgment; and, the misrepresentation having been made in order to induce the Court to do what it would not have done if the truth had been

told, why should it not be said that the judgment was obtained by fraud?

I do not think the charge is answered by saying that the debt for which judgment was obtained was an honest debt. The finding in the present action is, that it was due to the plaintiff; but it may not be quite legitimate to say that because in this action the defendant has not been able to successfully impeach it, there could have been no answer on the part of the company if an opportunity had been given for a defence. And we have no right to assume that if a notice had been published, such as the statute provides in case of their being no president or secretary and no chief office or place of business, some one might not have been forthcoming to defend the action.

But the question is by no means concluded by the fact that the company owed money to the plaintiff. It is not alone the existence of a debt, but the recovery of judgment and the return of a writ of *fi. fa.* that entitles the creditor of the company to call upon the shareholder.

There is something not entirely dissimilar in principle between the *ratio decidendi* upon which, in *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D., 137, and 4 Ex. D., 107, the Courts pronounced against the judgment which was there attacked, and that which we are asked now to adopt. In that case the defendants, in order to anticipate the recovery of judgment in a *bond fide* action for a penalty, procured an action to be brought in the name of one Rolfe, who allowed his name to be used by the defendants' solicitor as plaintiff in an action against the defendants. The same persons were in reality both plaintiffs and defendants. In this case the defendant company was represented by the plaintiff, who was the employer of Mr. Smith, the person who was served with the writ, and who persistently but vainly applied to the plaintiff for instructions for the defence. The association of Watson with the plaintiff does not, so far as I can perceive, alter the case so as to aid the plaintiff. If he was to be regarded as still a director, as I suppose he legally was, he did not

represent the company as the board of directors might have represented it, and he does not appear to have interfered in this matter.

There is a want of reality about the proceeding very much the same as if the plaintiff had served himself with his own writ and then on behalf of the defendant confessed judgment to himself.

In one of the cases cited to us for the sake of the exposition it contains of the law on the point now before us *Bundon v. Earl of Becher*, 3 Cl. & F. 511, Lord Brougham gave expression to a rule of which we are often reminded, saying: "I do not mean to say that the case is free from doubt; but my doubts upon it are not so strong as to incline me to advise your lordships to reverse the judgment of the Court below, for a Court of Appeal ought never to reverse a judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong."

On the whole I cannot say I am convinced that the learned Judge in the Court below was wrong in his finding, and therefore I think we should dismiss the appeal.

BURTON, J. A.—The plaintiff, who claims to be a judgment creditor of the Canada Sewing Machine Company,—a company incorporated (under the Joint Stock Company Letters Patent Act, of 1869), sues the defendant as a shareholder. The defendant pleaded a great number of pleas, upon which issue was joined and replications pleaded leading to demurrers and objections to the pleas; but, as I understand the books, the learned Judge struck out some of the pleas as raising issues not important to be considered until after the determination of the other issues, and as I read his memorandum in connection with his actual finding as to those issues which were intended to raise questions of law as well as fact,—that is to say, all the pleas other than the fourth—the action was to be decided upon the facts in evidence irrespective of the form of the pleadings.

The learned Judge in giving judgment finds on all the issues of fact, except the issue joined on the fourth plea, in favor of the plaintiff, and the issue joined on that plea in favor of the defendant, but gave no reasons for his decision, and the matter comes now before us on appeal from his judgment on the fourth issue, and by way of cross appeal on the other findings, the defendant claiming that whilst upon the evidence he is precluded from denying that he became a shareholder, he is in a position to shew that he was released by the subsequent action of the company in compromising what was a *bond fide* dispute between him and the company, with the knowledge and assent of the plaintiff.

The fourth plea was in these words :

" And for a fourth plea, on equitable grounds, the defendant says that the said alleged judgment was recovered by the plaintiff against the said Canada Sewing Machine Company, Limited, by and through the fraud and covin of the plaintiff, and the said writ of execution in the declaration mentioned was procured to be issued and returned as therein alleged by the fraud and covin of the plaintiff."

I take it to be clear law that, excepting in cases of fraud, the validity of a judgment which has been obtained against an incorporated company cannot be impeached by a shareholder any more than by the company itself. The judgment is conclusive, and nothing can be set up as a defence to a *sci. fa.* upon it or to an action of this nature, except some matter which is consistent with the validity of the judgment, with that sole exception.

A judgment, however, obtained by *fraud and collusion* is always impeachable by innocent parties affected by it. If, therefore, a shareholder is proceeded against upon a judgment obtained by fraud on the part of the creditor, it no doubt may be impeached. Some question was at one time raised as to whether a shareholder should in such a case move to set aside the judgment or plead the fraud to the action, but whilst I apprehend that the former course was open to him, I should think it equally clear

that he was always at liberty to raise the defence of fraud in the recovery of the judgment by plea. There are decisions to be found to that effect, and in the absence of decision it is so perfectly clear, on principle, that I should have no hesitation in so holding.

But then arises the question what is necessary to sustain such a plea, and the rule, I apprehend, was always the same both at law and in equity.

"Fraud", says the Master of the Rolls, in the case of *Green v. Nixon*, 33 Beav. 530, "is the same in all Courts, but such expressions as 'constructive fraud' are, in my opinion, inaccurate. Judges may, no doubt, differ as to what precisely constitutes fraud, and it is not my intention to attempt any very complete definition of the word, but I consider that it implies a wilful act on the part of one whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to."

The plea in *Phillipson v. Egremont*, 6 Q. B. 587, shews, I think, what would be necessary to make out such a defence.

The gist of that plea was, that the company, not being liable at law, the public officer of the company *fraudulently and deceitfully and by connivance with the creditor*, the then plaintiff, suffered the judgment in order to charge the defendant.

What has to be established in such a plea is fraud on the part of the judgment creditor.

The question to be considered upon this issue, upon the facts of the present case, is, not whether there was any irregularity or error in the judgment, but whether the whole proceeding was collusive and fraudulent.

There is nothing whatever in the evidence from first to last to shew that there was any agreement of any kind between the plaintiff and the secretary or any member of the company in reference to the suit instituted against the company, and we are not lightly to presume fraud. Whether the service on Smith was a good service, so as to warrant the entry of the judgment, is a question I shall discuss presently, but is one which, in my judgment, is not raised in this plea, and could not be raised by plea.

The case of *Girdlestone v. The Brighton Aquarium Co.*, 4 Ex. D. 107, is no authority for the defendant's contention. The action there was brought by the defendants in the plaintiff's name, with the view to defeat another *bond fide* action for the penalty, and might not inaptly be described as fraudulent and covinous. But how that term can be applied to a creditor who adopts a particular mode of obtaining a judgment openly, and without artifice, or concert, or agreement with anyone, I do not understand, even though the mode adopted may have been erroneous.

I think, therefore, that the Judge's finding upon the fourth issue was incorrect, and should be reversed.

Whether the service upon the person who assumed to act as secretary was, under the circumstances, a good service, is a totally different question.

The company, when in active operation, was managed by five directors, including a president and vice-president, and C. R. Smith was secretary.

The last annual meeting of directors took place in December, 1877, and they remained in office until their successors were appointed. Smith was also then appointed secretary, but whether his appointment continued beyond the year may be doubtful.

The president died before the commencement of the plaintiff's action, and the affairs of the company were placed in the course of voluntary liquidation under an agreement, 8th March, 1878, made between the company, and Mr. Dewar, Mr. Watson, Mr. Harvey the plaintiff, and the Consolidated Bank, the latter four being the only creditors of the company; and the secretary continued to act, so far as it became necessary to act, as the secretary of the company or of their trustees named in that agreement, who were winding up the company's affairs.

This instrument was not an assignment, but it was mainly for the purpose of securing the Consolidated Bank and defining the rights and liabilities of the several parties *inter se.*; but no directors' meeting was apparently held subsequently to its execution, with the exception of one

to approve of that agreement, and Messrs. Harvey and Watson, two of the directors and creditors, were appointed to superintend the winding up. All the available assets, except the amount due on the stock of this defendant and another shareholder, were apparently realized.

The president then being dead, and the plaintiff still vice-president, he proceeded on the 5th February, 1880, to sue the company, and issued a writ on that day.

All that we know of the proceeding upon the evidence is to be gathered from entries in the secretary's books and his own account of what he did. He says that he was served on the 5th February, and on the following day brought it to the notice of Watson, one of the directors, and the plaintiff, for instructions, which he never received.

It is said, and may be assumed for the purpose of the argument, that Smith was not then secretary. It is a fact immaterial in itself except as shewing that the company, the defendants in the original action, were never served with process; but this is a matter which cannot be raised by plea, as the cases I think clearly shew, but in such a case an application should be made to set aside the judgment as irregular, and there would seem to be good reasons for confining the parties to that course, as it would not necessarily follow that a Court would set aside a judgment thus obtained if the debt were justly due by the company to the plaintiff.

In the case of *Holmes v. Russell*, 9 Dowl. 487, the Court held that a judgment obtained against a defendant where he had not been served with process was an irregularity only, and the defendant was bound to move promptly after he became aware of the entry of the judgment, and there being no affidavit of merits the Court refused to set aside the judgment.

In the present case there is no pretence that there was or could be any answer to the plaintiff's claim in the original action. I apprehend it to be too clear for argument that the defendant was sufficiently a party to the judgment to be entitled to move against it, and that unless

he had done so promptly the Court would have refused to interfere, except upon an affidavit of merits.

What we have then is a judgment not moved against, and which it is apparent there was no pretence for moving against, and which we are called upon to say under this or some substituted plea was fraudulent and void.

I have already intimated my idea that the agreement made by the parties at the trial was intended to refer to the pleas other than the fourth, but I do not think we ought to hold the defendant to that plea as pleaded if the defence suggested is open to him upon any form of pleading.

I think the authorities, however, will be found to bear out the view I have above expressed, that if the judgment was erroneous or irregular only, as long as it remains unreversed it is binding and conclusive upon everyone, and the only course is to set it aside on motion. But if the judgment has been obtained by fraud and collusion between the plaintiff and the company, it is always open to a shareholder to raise the defence by plea.

Thus considered there is no difficulty in reconciling the cases and the dicta of the Judges contained in them.

It is laid down in Com. Dig. Pleader, 3 L. 10, that the defendant cannot plead "a thing which proves the judgment erroneous and voidable."

In *Bradley v. Eyre*, 11 M. & W. 432, Parke, B., says: "If the person sued as secretary was not secretary at the time of the commencement of the suit, the judgment is erroneous and irregular."

He by no means countenances the idea that his not being secretary could be made the subject of a plea. On the contrary, the inference is that his opinion was that such a question was not open, except by motion to set aside the judgment, for he says: "In point of fact this is a mere proceeding for enabling the creditor to obtain his debt from the shareholders, and even if the person sued was not secretary, my notion is that the company are still bound by the judgment."

In that case the company was liable to be sued through

its secretary, but the case has this bearing, that it is equivalent to a plea in the present case, that the original company had not been served with process, and had no notice thereof before judgment which, as I have already pointed out, would merely go to shew that the judgment was erroneous and voidable, and therefore would not be the subject of a plea.

I take it there is no distinction between those cases decided under the English Acts and the present in one particular referred to by my brother Patterson, viz: that the shareholders here, as well as the partners there, are parties or privies to the action of the company. The plaintiff might, I assume, have proceeded by *sci. fa.*, or have brought an action as he has done founded on the statute, but the shareholder there as here is a party to the judgment, the *sci. fa.* is only for the purpose of obtaining execution.

The dictum attributed to Lord Denman, in *Bosanquet v. Graham*, 7 Jur. 831, where a judgment is collusively obtained by the concert of the plaintiff and the company, agrees with the view I have expressed, that in such a case the fraud can be raised by plea as well as by motion.

I have already intimated my concurrence in the opinion that any plea alleging fraud and collusion between the plaintiff and the company for the purpose of charging the defendant would be good, and that was the point decided in *Phillipson v. The Earl of Egremont*, 6 Q. B. 587.

The judgment of my learned brothers proceeds upon a point not taken in the reasons of appeal or suggested on the argument, and with great deference is founded on what appears to me to be a misapprehension of the practice observed in such cases. No application to the Court is necessary for the purpose of signing judgment on default of appearance, and even if it were, a representation made in the honest belief of its correctness would not afford ground for imputing a fraudulent intent. If, therefore, that had been the course of proceeding it would still bring the matter back to the same point, that the judgment was

voidable only, and could not be the subject of a plea, but in point of fact no application was necessary, and no representation was made. The plaintiff filed his affidavit of service, and on his own motion and at his own risk signed judgment; it differs in no respect from *Holmes v. Russell*, where the process had not been served on the defendant, but an affidavit of service was filed with the writ. In this and all the other cases I have referred to, this was held to be a mere irregularity, which could not be the subject of a plea.

If the defendant instead of pleading as he has done, had set forth the fact that the process in the original action had been served upon a person who had for some years ceased to be the secretary of the company, and that the company had not been served with and had no notice of any process having been issued against them, I should have unhesitatingly held it bad upon demurrer, and that is precisely this case.

A motion to set aside the judgment is a different question, depending upon other considerations; if made after the delay which took place here before the defendant was called upon to plead, there being a debt admittedly due, as has been found by the learned Judge, I apprehend, in the absence of an affidavit of merits, the Court would have refused to interfere; but whatever might have been the fate of such a motion, it has not been made, and the sole question is whether, upon the facts in evidence, any plea which can be suggested would afford a defence; and to that I confidently reply in the negative.

I may refer, also, upon the point that this is not the subject of a plea, to *Marson v. Lund*, 16 Q. B. 344; *Bradley v. Warburg*, 11 M. & W. 452; *Rickets v. Bowhay*, 3 C. B. 889; *Hinton v. Acraman*, 2 C. B. 367; *Bank of Scotland v. Fenwick*, 1 Ex. 792.

I approve heartily of the rule so tersely and clearly enunciated by Lord Brougham in the extract from his judgment to which reference has been made, but if there is any proposition of law which to my mind is free from

doubt, it is that it is not open to a party to raise what is a mere question of practice by plea, and as I do not entertain the slightest scintilla of a doubt that the decision of this learned Judge below was in this respect erroneous, the quotation in my view of the case is without application to the question we are called upon to decide,

The other question is, whether what took place in reference to the defendant's shares deprived this plaintiff of his right as a creditor to proceed against him.

There is some conflict of evidence, but the following facts appear to be clearly established—that the defendant always insisted that he should not be called upon to pay his new shares, because some promise made to him by the president to discontinue the practice of paying a commission to some of the directors for indorsing had not been carried out: Further that on the 15th December, 1874, at a shareholders' meeting, the report of the directors was read, in which this passage appears:—

“We would also recommend that the unappropriated stock be sold when at any time a satisfactory offer shall be made to your directors, and that the board be empowered by this meeting to sell suchs tock, or any part thereof, to Messrs. Alexander Turner, George Thomson, H. B. Witton, and James F. Webster, they having applied to the company for shares. All of which is most respectfully submitted.”

And, in moving the adoption of the report, the president expressed himself to this effect:—

“They would notice that in the circular calling this meeting it was therein stated that the disposal of the unappropriated shares would be brought before your notice; the shares alluded to *were four, which are held by himself as trustee of the company*; and as Mr. John Harvey has expressed his willingness that six shares allocated to him shall be sold to any person whom the directors may agree shall buy the same, and considering the fact that Mr. Harvey refuses to take up and pay for the said shares, the directors had embodied in their report to-day a recommen-

dation that the unappropriated shares should be sold to certain persons therein named; they therefore proposed to sell the four shares of the company, and if Mr. Harvey still insisted on not accepting the allocation, and so expressed himself to-day, four also of the six allotted to him, so that in the event of the report being adopted, the directors would be empowered to proceed to sell to those applicants named in said report, providing that no shareholders were willing to purchase them, and of which they now had an opportunity of objecting to the report and having their own names inserted as applying for same."

The report was adopted on motion of the president, seconded by the plaintiff, and Mr. John Harvey the defendant is reported to have expressed his willingness in answer to the president to transfer the four shares if any transfers were required in the matter.

At the time of the meeting the directors had applications for eight shares, which, if carried out, would have exhausted the unappropriated shares, strictly so called, and four of the defendant's; but the application for two of them fell through, so that only two of the defendant's shares, those subsequently transferred to Turner, were dealt with.

It was suggested upon the argument that the whole six were dealt with, but this proceeded evidently upon a misapprehension of the evidence; the other four being those applied for by George Thompson on the 30th December, which transaction was afterwards carried out by a transfer of four shares then standing in the name of John F. Webster, which the directors declared forfeited and transferred to him.

These shares in no way affect the question we are considering.

But to come back to the meeting of the 15th December a resolution was then moved and carried, that any shares allocated but not settled for by the 17th of the month, the directors are empowered to dispose of to other parties at any time they may think desirable to do so.

This was in fact adopting and confirming, so far as the shareholders could do so, the resolution to a similar purport of the directors at their meeting.

It would further appear that on the day after the general meeting of the 15th December the secretary wrote to the defendant, enclosing an authority to him to transfer, on the defendant's behalf, the four shares, and an agreement to transfer the remaining two whenever the directors should dispose of the same.

This the defendant refused to sign, still claiming that his subscription was invalid, and claiming to have been relieved by the action of the Company and claiming further, that all that was required of him was his consent to the transfer of the shares to any person the directors might select, and that he agreed to do.

The directors promptly replied to this in these terms:

"Dear Sir—Referring to your favour of the 18th inst., I am instructed by the board of directors of the Canada Sewing Machine Company to inform you that the arrangements made with the bank preclude them from relieving you of liability in the matter of shares of new issue of stock subscribed for by you until they may be enabled to find purchasers for the same, and which they hope shortly to be enabled to do."

The directors then, in order to carry out their arrangements with Turner, as to the two shares disposed of to him, assumed to forfeit them, and to give a title in that way.

The 29th section of the Joint Stock Companies' Act provides, that if after such demand on notice as is by the by-laws of the company prescribed, any call be not paid within such time as by the by-laws may be limited, the directors in their discretion, by vote to that effect, reciting the facts, and duly recorded in their minutes, may summarily forfeit any shares whereon such payment is not made, and the same shall thereupon become the property of the company, and may be disposed of as by the by-laws or otherwise they shall ordain.

The resolution of the directors of the 3rd December related not to these shares alone, but to all shares on which the instalments or calls remained unpaid, and points rather to some fancied right to cancel the allotment than to a for-

feiture of shares already allotted. But even if the language were sufficient to operate as a valid forfeiture in other respects, it can only be regarded as an expression of their intention to forfeit if payments were not made by the specified time, and this seems to have been the directors' own view, for they did afterwards proceed to forfeit the two shares agreed to be sold to Turner when the defendant refused to make the transfer after proposing to do so at the meeting.

The power given to the directors is a very large one, not hedged in as we usually find by requiring expressly a notice for a certain number of days or weeks to be given, and then that the forfeiture should be confirmed at a general meeting of shareholders; and the rule applicable to forfeitures, that the power to be effectually exercised must be pursued with the greatest exactness, ought to be applied in such a case with great strictness.

I do not understand counsel to contend in this case that the resolution operated as a forfeiture, and that in itself would not help the defendant, as I apprehend, under the wording of this enactment, the right to forfeit is a cumulative remedy; and whilst as to future calls he would be relieved, inasmuch as by the forfeiture he ceases to be a member of the company, the right under the statute is not to sue or forfeit, but they are authorized to sue and have the further right to forfeit if the calls are not met. I do not, however, understand the defendant's counsel to put his defence on the ground of forfeiture, but as I have already stated on the ground of a *bond fide* dispute as to liability, and a compromise of that dispute by releasing him from liability and accepting or agreeing to accept a transfer of his shares.

It is quite possible that the defendant may have regarded what occurred at the meeting in that light, but that is not sufficient. Was a definite arrangement of that kind come to by both parties?

I do not question the right of the company to make such an arrangement in settlement of a *bond fide* dispute

as fully as individuals may do so, but the question is, was such an arrangement made; and if the learned Judge has come to the conclusion that no such arrangement as the defendant contends for was made, are we to say that he is wrong?

The company when they heard that that was the view of the defendant very promptly informed him that they did not acquiesce in it, and pointed out that their engagements with the bank precluded their releasing a solvent shareholder. I think, therefore, the evidence would amply warrant the Judge in arriving at the conclusion that the company's view of the effect of the transaction and not the defendant's was the correct one.

I think it at least questionable whether even in the defendant's view the agreement would avail him as a defence against a creditor in a suit of this nature. If he had been in a position to shew that he was induced by fraud to take these shares, so that he might have successfully maintained a suit against the company to rescind the contract, his right to do so would be no defence to this action if he had omitted to commence proceedings before a return of the plaintiff's execution, and it may be that the same result would follow if he had taken no steps to have his name removed from the stock book or to have the alleged agreement carried out. It is not necessary to consider how that would be, as the evidence is sufficient to warrant the finding of the Judge on the other grounds.

In that view of the evidence is there anything to estop the plaintiff, who was vice-president of the company, and who was in a position to know everything which had occurred, from taking these proceedings?

I confess I see nothing. He appears to have insisted as trustee that the claim should be prosecuted on behalf of the company, but his co-trustee refused his assent. We have nothing to do at present with the rights of the bank if in point of fact they were not advised of the existence of this claim and given the option of having it prosecuted for the general benefit; it is possible that they may have a

right to call the plaintiff to account ; but that is, as it seems to me, foreign to the present inquiry.

I think the appeal should be allowed and the cross appeal dismissed with costs, and judgment rendered for the plaintiff for the amount due on the stock, if that is less than the amount due on his execution.

SPRAGGE, C. J. O.—I should have felt some difficulty in holding that the evidence given in this case established the affirmative of the fourth plea, namely: that the plaintiff's judgment was recovered, and that the execution thereupon was procured to be issued by and through the fraud and covin of the plaintiff, if those words "fraud and covin" were to be taken in the sense in which they are ordinarily used in pleading; but both my learned brothers understood, I assume correctly, as they have stated in the judgments that they have delivered, that the action was to be decided upon the facts in evidence irrespective of the form of the pleadings.

In my opinion the evidence does not shew that Smith, at the date of the service upon him of process in the suit of the plaintiff against the company, was the secretary, of the company, or that the service was made "at the office or chief place of business of the company," but on the contrary, that what appears by the evidence is, that at the date of such service upon Smith he had ceased to be the secretary of the company, and that the place at which he was served with such process was not the office or chief place of business of the company; but that the company had at that date no office or place of business. That being the case, there could be no valid service of process, except in the other mode pointed out by the statute; and that was not done.

My learned brothers have discussed the questions whether under the circumstances there was a valid recovery of judgment against the company; and whether the defendant in this action can object the invalid recovery of judgment by plea. Unfortunately they have arrived at

different conclusions. I have myself also carefully considered these questions and agree with my brother Patterson in his conclusions, and in the reasoning by which he has reached them, and in his comments upon the cases.

What is reported to have been said by Baron Parke, in *Bradley v. Eyre*, 11 M. W. 432, was, as my learned brother says, a mere dictum; and it was a very faint one: "My notion is," is the phrase that he uses, and he expresses his own sense that his observation was of that character by adding: "It is sufficient to say that upon this record the plea affords no answer."

There is no doubt that the objection might be made by application to the Court to set aside proceedings; but there is, I believe, no case that decides that in an action against a shareholder upon a judgment recovered against the company, an objection to the regularity of its recovery may not be taken by plea.

In *Bradley v. Eyre*, Parke, Baron said: "Unless the proceedings are against a person who was secretary at the time of the commencement of the suit the judgment is erroneous and irregular." This seems to me to be not consistent with the passage; "and even if the person sued was not secretary, my notion is, that the company are still bound by the judgment;" and it may be that this last passage is misreported; but, however that may be it is hard to see why a judgment erroneous and irregular may not on that ground be objected to by plea.

Further, I have great difficulty in seeing how it can be open to the plaintiff to object that the defendant's objection cannot be taken by plea. In *Bradley v. Eyre*, the plea—manifestly a bad plea—was demurred to. In the case before us the plaintiff joined issue upon the plea. I am less familiar with proceedings of this nature than I was a number of years ago; but unless things have very much changed, a plaintiff, after taking issue upon a plea, cannot be heard to say that the matter pleaded could not be placed before the Court by way of plea, but only in some other mode.

The case of *Girdlestone v. The Brighton Aquarium Co.*, 4 Ex. D. 107, is no authority for the defendant's contention. The action there was brought by the defendants in the plaintiff's name, with the view to defeat another *bond fide* action for the penalty, and might not inaptly be described as fraudulent and covinous. But how that term can be applied to a creditor who adopts a particular mode of obtaining a judgment openly, and without artifice, or concert, or agreement with anyone, I do not understand, even though the mode adopted may have been erroneous.

I think, therefore, that the Judge's finding upon the fourth issue was incorrect, and should be reversed.

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The president then being dead, and the plaintiff still vice-president, he proceeded on the 5th February, 1880, to sue the company, and issued a writ on that day.

All that we know of the proceeding upon the evidence is to be gathered from entries in the secretary's books and his own account of what he did. He says that he was served on the 5th February, and on the following day brought it to the notice of Watson, one of the directors, and the plaintiff, for instructions, which he never received.

It is said, and may be assumed for the purpose of the argument, that Smith was not then secretary. It is a fact immaterial in itself except as shewing that the company, the defendants in the original action, were never served with process; but this is a matter which cannot be raised by plea, as the cases I think clearly shew, but in such a case an application should be made to set aside the judgment as irregular, and there would seem to be good reasons for confining the parties to that course, as it would not necessarily follow that a Court would set aside a judgment thus obtained if the debt were justly due by the company to the plaintiff.

In the case of *Holmes v. Russell*, 9 Dowl. 487, the Court held that a judgment obtained against a defendant where he had not been served with process was an irregularity only, and the defendant was bound to move promptly after he became aware of the entry of the judgment, and there being no affidavit of merits the Court refused to set aside the judgment.

In the present case there is no pretence that there was or could be any answer to the plaintiff's claim in the original action. I apprehend it to be too clear for argument that the defendant was sufficiently a party to the judgment to be entitled to move against it, and that unless

he had done so promptly the Court would have refused to interfere, except upon an affidavit of merits.

What we have then is a judgment not moved against, and which it is apparent there was no pretence for moving against, and which we are called upon to say under this or some substituted plea was fraudulent and void.

I have already intimated my idea that the agreement made by the parties at the trial was intended to refer to the pleas other than the fourth, but I do not think we ought to hold the defendant to that plea as pleaded if the defence suggested is open to him upon any form of pleading.

I think the authorities, however, will be found to bear out the view I have above expressed, that if the judgment was erroneous or irregular only, as long as it remains unreversed it is binding and conclusive upon everyone, and the only course is to set it aside on motion. But if the judgment has been obtained by fraud and collusion between the plaintiff and the company, it is always open to a shareholder to raise the defence by plea.

Thus considered there is no difficulty in reconciling the cases and the dicta of the Judges contained in them.

It is laid down in Com. Dig. Pleader, 3 L. 10, that the defendant cannot plead "a thing which proves the judgment erroneous and voidable."

In *Bradley v. Eyre*, 11 M. & W. 432, Parke, B., says: "If the person sued as secretary was not secretary at the time of the commencement of the suit, the judgment is erroneous and irregular."

He by no means countenances the idea that his not being secretary could be made the subject of a plea. On the contrary, the inference is that his opinion was that such a question was not open, except by motion to set aside the judgment, for he says: "In point of fact this is a mere proceeding for enabling the creditor to obtain his debt from the shareholders, and even if the person sued was not secretary, my notion is that the company are still bound by the judgment."

In that case the company was liable to be sued through

its secretary, but the case has this bearing, that it is equivalent to a plea in the present case, that the original company had not been served with process, and had no notice thereof before judgment which, as I have already pointed out, would merely go to shew that the judgment was erroneous and voidable, and therefore would not be the subject of a plea.

I take it there is no distinction between those cases decided under the English Acts and the present in one particular referred to by my brother Patterson, viz: that the shareholders here, as well as the partners there, are parties or privies to the action of the company. The plaintiff might, I assume, have proceeded by *sci. fu.*, or have brought an action as he has done founded on the statute, but the shareholder there as here is a party to the judgment, the *sci. fu.* is only for the purpose of obtaining execution.

The dictum attributed to Lord Denman, in *Bosanquet v. Graham*, 7 Jur. 831, where a judgment is collusively obtained by the concert of the plaintiff and the company, agrees with the view I have expressed, that in such a case the fraud can be raised by plea as well as by motion.

I have already intimated my concurrence in the opinion that any plea alleging fraud and collusion between the plaintiff and the company for the purpose of charging the defendant would be good, and that was the point decided in *Phillipson v. The Earl of Egremont*, 6 Q. B. 587.

The judgment of my learned brothers proceeds upon a point not taken in the reasons of appeal or suggested on the argument, and with great deference is founded on what appears to me to be a misapprehension of the practice observed in such cases. No application to the Court is necessary for the purpose of signing judgment on default of appearance, and even if it were, a representation made in the honest belief of its correctness would not afford ground for imputing a fraudulent intent. If, therefore, that had been the course of proceeding it would still bring the matter back to the same point, that the judgment was

follows: "And in the event of any of my said children dying before coming into possession, as aforesaid, and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her or their father or mother if then living;" and in the same clause an annuity of £50 is given to the husband or wife of any child of the testator dying "after marriage and before coming into possession, as aforesaid."

The will is divided into sections. That which makes direct provision for the wife is the third. All the other provisions that I have quoted are in the fourth.

We find as to lot one that which I take to have been intended to convey the same meaning expressed in three different ways. First, "if he be then living." This phrase is omitted from the devise of other lands in favor of the four sons and from the devise in favor of the daughters, probably without any intention; for the latter is followed by the very explicit direction that all the devises shall take effect upon, from and after the death or marriage of the wife, and not sooner; and the same meaning is, I take it, expressed no less than three times in passages that I have quoted, by the phrase "before coming into possession." There can be no doubt that all these passages apply to the one event, the death or second marriage of the testator's widow. It was then, and not sooner, that the devises in favor of children were to take effect, and that was the event fixed for their coming into possession.

Apart from decided cases, no one, I should have thought lawyer or layman, would hesitate in attaching to the language of the testator the meaning that those only of his children who were living at the death or marriage of his widow, or who had died leaving issue, were to take what was devised to them, upon the happening of one or the other of those events. An intelligent layman would point to the devise of lot one as expressing that meaning in so many words, except that it required the aid of a subsequent clause to enable issue to take, if Thomas himself

were not then living. It is, indeed, but rarely that we find the intention of a testator expressed so unequivocally.

If, therefore, the will is to be interpreted as giving to Thomas an estate in lot one although he died childless, before the death of his mother, it must be because we have to interpret the will according to some rule or canon of construction, not because the meaning of the words used leads us so to interpret it.

I have examined the cases referred to by the learned Judge, but am unable to arrive at the same conclusion.

Pearsall v. Simpson, before Sir William Grant, 15 Ves. 29, and the point decided in it, are referred to in *Madison v. Chapman*, 4 K. & J. 719, thus: "The class of authorities, of which *Pearsall v. Simpson* may be taken as the leading case, merely establish that where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent upon a condition essential to the determination of the interests previously limited, the Court is at liberty to hold that notwithstanding the words in form import contingency, they mean no more in fact than that the person to take under the limitation over is to take subject to the interest so previously limited." Turning then to *Pearsall v. Simpson*, we find that there was a bequest of £400 upon trust; that one of the limitations was in a certain event to pay the interest to a brother-in-law of the testatrix, Richard Stafford "during his natural life; and from and after his decease, in case he shall become entitled to such interest, then " over to certain first cousins of the testatrix. Richard Stafford died before the happening of the event upon which he was to become entitled to the interest, and the question was, whether his death operated to defeat the gift over. It would have been a most absurd consequence if it did; and it was so treated by Sir William Grant, who said: "The only question is, whether Richard Stafford's taking for life was a condition precedent to the cousins of the testatrix taking the capital. That would be a most absurd condition, undoubtedly; for there is no

sense or reason, making the right of her first cousins depend upon a fact totally unconnected with any intention as to them. What was it to them whether Richard Stafford took or not? Such a construction is not to be made, unless absolutely necessary." * * It was doubtful whether Richard Stafford would live to become entitled to the interest. The testatrix giving the capital over after his death, recollects that he may not live to take the interest; but if he does she makes his death the period at which her first cousins are to take. It is not a condition precedent, but fixing the period at which the legatees over shall take, if he ever takes. The words will bear that construction; and the reason of the thing seems to require it."

It will thus be seen in how very plain a case the rule upon which the decision in the Court below proceeded had its origin. The facts of the case and Sir William Grant's reasoning upon them have no application to the case before us. I have omitted, for the moment, a passage in the judgment which shews this conclusively. The Master of the Rolls deals with a case put by counsel in argument (not, however, appearing otherwise in the report of the case) and says, "It is very different from the case put by Mr. Cooke, a case of direct condition; that if A lives to a particular period he shall take, otherwise he shall not." The case thus distinguished from the case before Sir William Grant is just the case before us; and so we have the authority of Sir William Grant, that the rule, of which the case before him was an instance, does not apply to the case before us.

We find the like distinction in *Madison v. Chapman*. The terms of the will were very dissimilar from those in this case. Sir W. Page Wood, while applying to the case before him the rule enunciated in *Pearsall v. Simpson* by Sir Wm. Grant, like him points out a class of cases to which the rule does not apply. "For instance," (he says), "if the limitation be to A. for life, remainder to B. for life, and if at the death of B., A. shall have died under the age of twenty-one years," or, "And if at the death

of B. A. shall have died without leaving children then to C in fee, here, in either case, room is left for contingency. The condition of A's dying in the first case under twenty-one, and in the second without leaving children, is an event which may or may not have happened when the life estates in A and B are determined; and until it has happened the limitation over is contingent, not merely in appearance but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply.

In the same case the learned Judge did not feel himself at liberty to go outside the very terms of the will, or rather of a codicil to the will. The will directed a division of the estate between the widow of the testator and his two daughters, with a provision in favor of the daughters, in case of the death of one of them, or of the mother. The codicil provided that in case both his children should die in their minority and leave no issue, then in such case, and in such case only, he gave the whole of his property to his wife for life, with remainder over. Both the daughters died unmarried, the elder having attained her majority, the younger under age. Sir. W. Page Wood held that the death of the eldest daughter under age was a condition to the limitation over taking effect, and held the limitation over to be strictly a contingent limitation, and that the doctrine of *Pearsall v. Simpson* did not apply to such a case.

Another of the cases referred to upon this point is that of *Franks v. Price*, 3 Beav. 182, and, as is said by Mr. Jarman, the case presents an instance both of an apparent and also of a real contingency in the same will. The limitations were numerous and complicated. Lord Langdale held a provision, that in case either of two nephews (Moses and Napthali) of the testator should, after the deaths of certain persons named, die without issue, then to the survivor for life, that so far as the death of a nephew being after the death of those other persons was concerned it did not import contingency; but he held

otherwise as to other limitations in regard to one nephew dying before the other leaving issue male, the words being clear and repeated with apparent care; as to these provisions he held that the words must have their natural meaning, and be taken to provide only for the precise cases which were expressly described.

I do not propose to go through the other cases referred to upon this point. They do, none of them, in my judgment, countenance the position that language such as is used in this will can be read otherwise than as importing contingency; or as it is put in some of the cases, in order to a party taking under a will he must answer the description prescribed in the will; thus in *Festing v. Allan*, 12 M. & W. 279, Lord Cranworth, then Rolfe B., in delivering the judgment of the Court and distinguishing the case from *Phipps v. Akers*, 9 Cl. & F. 583, and cases of that class, said (p. 300.) "The clear distinction in the present case is, that here there is no gift to any one who does not answer the whole of the requisite description. The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one; and no one who has not attained his age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing." To answer the description prescribed in this will for the devisee *cestui que trust* of lot one, he should either have been living at the death of the testator's widow, or if not living have died leaving issue.

The three cases to which I have referred and which are cited as instances of the rule upon which the decision of this case has proceeded, all shew the non-applicability of the rule to the provisions of this will. Of this class of cases Mr. Jarman says correctly (p. 778, 3rd ed.) that "they clearly demonstrate that the Courts will not construe a remainder to be contingent merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitation affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be

considered, however, as exceptions to the general rule, and agreeably to the maxim *exceptio probat regulam*, they confirm rather than oppose the doctrine that devises limited in clear and express terms of contingency do not take effect unless the events upon which they are made dependent happen," and it is only in such a case as is put by Mr. Jarman (p. 782) where the construing of a devise to be contingent in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, that the Court will struggle to avoid such a construction. I fail to see any purpose clearly, or at all, expressed by the testator in this case that would be rendered nugatory by construing the devise in this will to be contingent. Such a construction will, as it appears to me, be in accordance with the spirit as well as the letter of the will. Any other construction would, in my judgment, do violence to the language of the will; and as far as we can see, fail to carry out the manifest intentions of the testator.

I think the construction of this will contended for by the appellants might safely be rested upon the cases cited against that construction. Without referring to any cases, the meaning appears to me to be clear, and it seems to me that it would be a mere waste of time to shew that the Judges in England have interpreted wills expressed in terms similar, or analogous to the terms used in the will before us, according to the plain ordinary grammatical meaning of the language employed, and that they have done so in cases where they had reason to believe, that if events which happened had been foreseen by the testator, or the contingency that actually occurred had been present to his mind, he would have made a provision in respect to it that would have given a different result in regard to the rights of parties, than the rights which the Courts have felt themselves bound to adjudge to the parties, under the terms of the will.

An instance of this, is the construction of the codicil in *Madison v. Chapman*, to which I have referred; and cer-

tainly there could scarcely be a stronger instance than is furnished by the case of *Denn ex dem Radcliffe v. Bagshaw*, 6 T. R. 512.

The devise upon which the question in that case turned, was, to the daughter of the testator, Margaret Bagshaw, for and during the term of her natural life; and from and after her decease to the first son of her body, if living at the time of her death, and the heirs male of such first son; and for default of such issue to the second son of her body, if living at the time of her death, and the heirs male of such second son; and so to the third, fourth, and other sons for default of such issue of the one next prior in seniority; and in default of such issue male then over to a nephew. It will be observed that the devise to the eldest son of Margaret was in the same terms (except as to tenure) as is the devise in this case of lot one to Thomas, viz., if living at the time of the death of his mother. Margaret had a son, who died leaving a son, but he died before his mother, and so did not answer the requisite description of a son living at the time of the death of his mother, and it was adjudged that he could not take; and that neither could his son take, but that the gift over took effect. The will of Mr. McKay was better drawn in that respect, than the will in the case cited, inasmuch as it provides for the case of issue being left by the son, who might not be living at the time of the death of his mother. The Court came to the conclusion that they did very unwillingly, Lord Kenyon said: "In opposition to our wishes, but in conformity with all the cases upon the subject." That case must, I should have thought, govern the case before us. The cases are not distinguishable.

There are many other cases in affirmance of the one to which I have last referred, but the question is, to my mind, too clear to make it necessary or even proper to refer to them.

I will merely add that, if it could be held that Thomas took a vested interest under the will, it is clear, I think, that that interest was divested by his dying without issue before the death of his mother.

In reading over carefully Mr. McKay's will in order to place a construction upon it, it did not occur to me to doubt that that which is put in the will in the form of a proviso, and which follows the disposition made of his whole estate, real and personal (with the small exception of the gift of his silver cup and his books), must be read as applying (with that small exception) to his whole estate. Its position in the will is where it would properly be if applying to all that was before it. Its language is appropriate to that application of it. That clause and the one succeeding it are evidently to be read together; they provide for two contingencies—the first, the death of the children without issue; the second, the death of children leaving issue. In the first, the phrase he uses is "property or money hereby devised or bequeathed," "property" covering realty as well as personalty—the word devised, applying to realty; bequeathed, to personalty; the same words (except the word will) that are used by him in the commencement of his will in his devise and bequest of his whole estate, real and personal, to his executors. And this proviso is not a part of the clause which disposes of the residue of the personalty, but is, with the clause following, separate and distinct; and being so, the word "hereby" may properly be read as equivalent to "by this my will."

With the greatest respect for the opinions of my learned brothers who think otherwise, I must say that I can see no good reason for limiting the application of these two clauses to the testator's personal estate. Looking at the whole of the will, its application to realty as well as personalty appears to me most consistent with the general scheme of the will; while so limiting it silences the distinct language of the trust as to lot one, "if he be then living." The devise to him, his heirs and assigns, is quite consistent with this as designating the estate he is to take if he lives to take any.

The argument has been confined almost entirely to lot one. The McKay Estate Act does not touch that lot. Upon the death of Thomas without issue, that lot passed,

subject to the life estate of the widow, the will says: "To go to and be equally divided among the survivors, and the legal issue of such, if any, as shall have died leaving issue." Mr. Plumb, for the infant children of Jessie Clark, contends that Jessie Clark took an estate for life only. I take the plain meaning of the will to be that any survivor upon such death as is described in the proviso should take an equal share with other survivors; and that the issue of any who had died should take the share that the parent of such issue would have taken, and there is nothing to denote that they should respectively take less than a fee simple. Jessie Clark was a survivor of Thomas; and she also survived her mother. She took, therefore, as I read the will, an undivided one-fourth of lot number one in fee.

As to lots two, three, four, and five, and the other land, not including lot one, devised by the same paragraph of the will to the testator's four sons in fee, the learned Judge appealed from expresses the opinion that the Act of Parliament had the effect of vesting these lands in John and Thomas McKay, the then surviving sons of the testator, and their heirs, as tenants in common, subject to the estate for life of the mother, with the right of survivorship between them in case one should die before the other without legal issue, before the death or marriage of their mother, I do not understand this to be controverted by counsel upon this appeal. The agreement of the sons and daughters to which the widow was an assenting party, which was carried out by the estate Act, varied to some extent the rights of survivorship; and under section 2 of the Act, the rights of John and Thomas would be, as it appears to me, such as in the opinion of the learned Judge they were. Thomas, in the events that happened, survived to the rights of John.

The result will be, that lot one, not being dealt with by the estate Act, passed under the will of the original testator to the daughters or issue of deceased daughters, as the case may be: that the disposition made by Thomas of his estate by will is inoperative as to that lot: that as to all

the lands devised to the four sons, Thomas, under the agreement and the estate Act, took as survivor in fee and it would follow, had the power of disposing thereof by will.

As to partition, I do not exactly understand of what lands partition is asked. As to the lands in Ontario, other than lot one, a disposition is made of them by the will of Thomas. Lot one is the only land in Ontario of which the daughters of the original testator are tenants in common, unless possibly lands that passed under the residuary clause of the will, and I do not know whether a partition of that lot, by itself, is asked. The question of partition may properly be left to the Court below.

The declaratory parts of the decree as to lot one are, in my opinion, erroneous. As to lots two, three, four, and five, they are, I think correct, but should not be confined to those lots, but should embrace all the lands devised to the four sons.

The learned Judge has abstained advisedly from placing a construction upon the will of Thomas McKay, the younger, and from giving any directions in respect of carrying it out, and no objection is made in appeal on that score.

The decree directs that the costs of all parties should be paid out of the estate of Thomas McKay, the younger; and parties agree that it is proper that the costs of the appeal should be paid out of the same estate.

Nothing is said in the decree, and nothing has been said in argument as to the residue of the real estate of the original testator. It is not dealt with by the estate Act, unless it is comprised in the lands conveyed by the daughters to the then surviving sons. No question is made before us in relation to such lands.

HAGARTY, C. J.—It seems clear, that as to the realty it was the testator's will that no specific devisee should enter into possession or actual enjoyment until the death or second marriage of his wife, subject to the fifth and last

clause, declaring that if his wife pre-deceased him his property should be disposed of at his death in the same manner as on her death or second marriage.

I agree with the learned Judge below that the proviso as to the death of any of his children without issue, or in the event of his leaving issue (from line 128 to line 144 of Appeal Book) (a) refers only to the personalty.

We then turn to the 4th clause. At the death or second marriage of the wife, "my son Thomas, if he be then living, shall have and take No. one * * * which I hereby devise to him, his heirs and assigns, to and for his and their own use forever."

Then follows the declaration that his sons Alexander, John, Charles, and Thomas shall have and take all his other real estate in Gloucester, naming the lots and other described realty, "all which I hereby devise to my said sons Alexander, John, Charles, and Thomas, and to their heirs and assigns, to and for their own use forever as tenants in common, subject, nevertheless to the payment of the legacies and annuities in and by this my will bequeathed and made chargeable thereon."

Then a devise of lands in Montreal to his daughters, their heirs and assigns, as tenants in common, then "I will and direct that all the said devises in this section of my will mentioned and devised *shall take effect* upon and from and after the death or marriage of my said wife, and not sooner."

If we be right in assuming that the provision as to children dying without or with issue before the death or marriage of the wife refers only to personalty, then we see that such a contingency was present to the testator's mind, and that he made no like provision as to the devises of his real estate.

We find the testator providing that his wife shall practically during widowhood have the whole estate.

(a) The three paragraphs on p. 165 of 29 Gr. commencing with "In Trust," &c.

At her death or second marriage, "my son Thomas, if he be then living, shall have and take lot number one." These words seem to point to a taking possession or personal enjoyment. If this were intended as purely contingent on his then living, we might naturally expect some devise over or words indicative of a disposition of this valuable property, if the contingency should not happen, instead of which, we find the words, "which I hereby devise to him, his heirs and assigns, to and for his and their own use forever."

The will does not say "in which event," viz., his then being alive, but the absolute grant in fee simple as indicative of the whole nature of the estate devised.

The devise immediately following of the other lots in the same township to the same devisee and his three brothers, contains no direction as to their being alive at any particular time, but is absolutely in fee, as in the preceding devise to Thomas.

No reason is suggested for any special distinction or creation of a contingency in the one case more than the other.

A direct devise in fee simple followed by a provision, as at line 113 of the Appeal Book (a), that said devise shall take effect from and after the death or marriage of the wife and not sooner, would not, in my judgment, be held to be merely contingent on the devisee being alive at such death or marriage.

Then the whole argument against vesting must rest upon the words already quoted, "if he be then living" not contained in the formal words describing the extent of the estate devised, but in the preceding part, that he, "if he be then living, shall have and take" the lot.

I have not seen any case in which the devise is worded as here.

(a) The provision referred to, is as follows : "And I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect upon, from and after the said death or marriage of my said wife and not sooner."

The principle of construction is stated in *Hawkins*, 236 : "It has long been an established rule for the guidance of the Courts that all estates are to be holden as vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without decided opposition to the terms of the will ; per Best, C.J., *Duffield v. Duffield*, 1 Dow & Cl. 311. To accomplish this, words of seeming condition are, if possible, held to have only the effect of postponing the right of possession."

Theobald 400—*In re Duke*, 16 Chy. Div. 114, James, L.J., says : "There is a strong, or I may say, a stringent rule, that if we have words clearly making a vested gift, clear words are required to convert it into a contingent one."

I quote these words as bearing on the devise before us, where there is the direct absolute gift in fee. We are asked by the appellants to read it as if the testator had said, "which *if he be then living* I hereby devise to him, his heirs, &c., forever."

As already stated, I look upon the words "if he be then living" as not involved in the direct devise in fee, but merely as descriptive "or historical" of his entry or taking possession.

There are cases in which, words of succession, such as issue, children, representatives, &c., are held to control the previously used words as to living at the time of a named event.

They are noticed in a very recent case *in re Webster's estate* before Kay, J., 23 Chy. Div., at p. 741 : Then there are the cases like that of *in re Phelps's Will*, L. R. 7 Eq. 151 : There the testator bequeathed a fund for the use of his widow for life and "after her death to be divided among my children then living or their heirs." In that case "or" seems to have been read "and," and the heirs of the children who pre-deceased the wife (including the two who were dead at the date of the will) were held entitled to the fund along with the children who survived her. But the reason given in the comments on that case in *Jarman*

on Wills 2, *Jarman* 788, is that the words read literally "my children then living or their heirs" were contradictory, because clearly the children then living would take absolute interests, and the words the children then living, or their heirs, read literally, were nonsense, and therefore the testator must have meant children then living and the heirs of such as should be then dead."

On this subject see *Theobald* 491.

It is impossible to speak with perfect confidence on a point like the present, or to attempt to review or reconcile the multitudinous decisions on the subject. We can only be guided in our attempt to attach a legal meaning to the words used by the general principles laid down in the books. The difficulty lies in determining that words not of the clearest import in themselves are used in each case with infinite varieties of expression, and modified and controlled by various provisions, references and repetitions to be found in each testamentary instrument.

If I could hold that the proviso at line 132 of the appeal book (a) applied to the realty, my confidence in the opinion I am expressing would be weakened.

I think these three paragraphs or sentences, from line 128 to 144 (b), refer wholly to the personalty. They begin with the trust that all "my personal property and estate" shall be divided "either in money or in kind."

Then there is the provision as to children dying "before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed," then the share or shares to go and be equally divided among the survivors, &c.

And in the event of children dying "before coming into possession as aforesaid," the issue "to take the portion or share which would have belonged to his, her or their father, &c., if then living," &c.

I think all this phraseology points to a disposal of the personalty only.

He had left all the Gloucester property to his sons, and

(a) 29 Gr. p. 165

(b) The three paragraphs above mentioned.

his daughters were otherwise provided for, and it seems to me inconsistent with the general scheme of the will to consider the sentence above quoted to apply to the real estate in question, thus bringing in the daughters to share, if surviving, equally with surviving sons.

On the whole, I think that the estate in lot one devised to Thomas was vested in interest.

If I held otherwise, I think I should be leaning in a doubtful case against vesting instead of in favor of it, and I would be reading into the absolute words devising the estate in fee further words importing the contingency.

BURTON, J. A.—The questions in this case arise upon the construction of the will of the late Hon. Thomas McKay, and the first ground of appeal against the decree pronounced by Mr. Justice Ferguson is, that under the will, the late Thomas McKay, the younger, only took a remainder in Lot No. 1 in the front concession, on the Ottawa, in the township of Gloucester, contingent on his surviving his mother, the widow of the testator.

I find it very difficult to say that the conclusion arrived at by the learned Judge upon this branch of the case is incorrect. Little assistance is to be derived from reported cases as to the construction of wills in matters of this kind, unless the language employed happens to be identical, but there are two rules which ought never to be lost sight of; one, that the will is to be construed according to the intention of the testator, as it is to be collected from the language employed and the dispositions contained in it; and the other, that the law favors the vesting of estates, and that in construing devises all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will.

If there be the least doubt, advantage is to be taken of the circumstance occasioning the doubt, and what seems to make a condition is holden to have only the effect of

postponing the right of possession: *Duffield v. Duffield*, 1 Dow & Cl. 311. The whole difficulty arises, in my view, on the peculiar wording of the first portion of section 4. Had the devise been confined to the first portion of the sentence, viz., "in trust also, that at the death or second marriage of my said wife, should such happen, my son, Thomas, if he be then living, shall have and take Lot No. 1," that would be a condition precedent, and no interest would, in my opinion, have vested in him unless he lived until after the death or second marriage of his mother, but the context may of course explain or qualify apparent words of contingency, and some effect must be given to the subsequent words: "which I hereby devise to him, his heirs and assigns, to his and their own use forever." It was manifest, I think, when the testator made a grant in the absolute terms he has done in the concluding part of the section, that he intended that Thomas should take an estate in interest, subject only to the life estate of the wife, and that the preceding words are merely inserted to denote more clearly when the remainder thus given absolutely is to take effect in possession.

And it seems to me that the same meaning is to be given to the directions which immediately follow the whole of the specific devises to the sons and daughters.

This view is in accordance with the general rules that I have stated, and is borne out, I think, by such cases as *Doe v. Lea*, 3 T. R. 41; *Manfield v. Dugard*, 1 Eq. Ca. Ab. 194.

The words used are different, it is true, and one of the learned judges who delivered judgment in *Doe v. Lea*, does say—"Had the devisor used these words: 'if Michael Lea shall attain the age of 24' that would have made it a condition precedent, and no interest would have vested in him unless he had attained that age." But I have endeavoured to point out that if the concluding words had been altogether omitted, or they had been accompanied by a similar restriction to that used in the preceding portion, this devise would also fail; but looking at the whole scope of the

proceeds of the real estate are directed to be divided whereas the strictly personal estate may be divided in kind.

Then comes a proviso, that if at the time fixed for the distribution any of the children have died without issue, it shall go to the survivor or the issue of such of them as shall have died leaving issue, and providing that the issue shall in all cases take the share or shares of his father or mother.

I agree with the learned Judge that these provisions are confined in their operation to the general devise of the residue which he had directed to be converted, and to the rest of his personal estate, not specifically bequeathed.

He specifically devised to his children the real property which he intended them to take absolutely in fee simple, subject only to the life estate of the widow, and he directed a conversion of the residue and made a separate disposition of it, and then declares :

"Fifthly and lastly. I will and direct that, in the event of my said wife dying before me, then and in that case my said property shall be disposed of at my death in the same manner as the same is hereinbefore directed and appointed to be disposed of at the death or second marriage of my said wife, in the event of her surviving me, so far as the same is practicable." Everything throughout the will seems to indicate an intention on the part of the testator to make a disposition of his property to vest absolutely at his death, in the event of his wife being then dead, and in the event of her being living to postpone the enjoyment only during her life.

It will be seen that in the commencement of clause 4 the testator is merely continuing to declare the trusts on which the trustees are to hold the property, and having declared what these are to be up to the time of the decease or second marriage of his wife, he then proceeds, that from that period Thomas shall have and take, or in other words, they shall allow Thomas to have and take possession of, Lot 1, which he intended to devise, and which in a few lines lower down he does proceed to devise to him absolutely in fee simple without qualification of any kind.

Those words taken alone would clearly confer an immediate vested interest on him in fee, upon the death of the testator. That being so, it requires clear words to convert that absolute gift into a contingent one. We see from other portions of the will that this devise was necessarily subject to the previous life estate of the wife, and the words which precede this devise itself may well be intended to apply to the possession only, without modifying or cutting down the absolute gift.

I am not unmindful that this is not the view which the parties who procured the passage of the private Act of Parliament, referred to in the pleadings, took of the construction of this will, but I have been unable to bring myself to the conclusion that that was correct.

In my view, the intention of the testator was to vest the fee absolutely in the sons and daughters to whom those specific devises were made, and that the construction arrived at by the learned Judge that the clauses providing for a failure of issue were intended to be confined to the last preceding bequest, is the correct one.

The parties have, themselves, by the agreement and Act of Parliament confirming it, regulated the right of succession as to the other lots which were, by the will, originally devised to the four sons, as tenants in common, and I agree with the learned Judge as to that portion of the decree.

I think, therefore, that the decree should be affirmed with costs payable out of the estate.

PATTERSON, J. A.—The plaintiff, who is sole surviving devisee in trust under the will of Thomas McKay, the younger, who was a son of the Honorable Thomas McKay, prays for a declaration of the rights and interests of the parties to the action, under the will of the Honorable Thomas McKay, the will of Thomas McKay, the younger and an Act of Parliament, 24 Vict., c. 133, passed to confirm a settlement made under the will of the Honorable Thomas McKay, by the devisees therein named.

The defendants are Mrs. McKay and Mrs. Keefer, the only surviving children of the Honorable Thomas McKay; the Hon. Robert McKay, who is the husband of Mrs. McKay; Flora Christine McKinnon, a daughter of Mrs. Keefer; six children of each of two deceased daughters of the Honorable Thomas McKay, whose names were Elizabeth Keefer and Jessie Clark, together with the executors of Jessie Clark, and the Merchants' Bank and the Bank of Ottawa, to whom Jessie Clark had, in her lifetime, mortgaged her interest in the estate.

The appellants are the Merchants' Bank, who contend that Jessie Clark's interest was more extensive than that which would follow from the judgment of the Court below. The lands in question are lot 1, in the front concession of the township of Gloucester, and lots 2, 3, 4, and 5 in the same concession. The main dispute concerns lot 1, and the question is whether under the will of his father Thomas McKay, the younger, took a vested remainder in fee in that lot or only the remainder contingent upon his surviving his mother, which event did not happen. If he took a vested remainder, that estate would pass by his will, which gave to his sister, Mrs. Clark, a life estate in one undivided fourth part of his lands; and as she would, in that case, have no other title, the charge created by her mortgage to the Bank expired at her decease.

But if Thomas had only a contingent remainder, then his interest ceased upon his death in the lifetime of his mother; and the lot would pass, either as undisposed of by the will of the Honorable Thomas McKay, to Mrs. Clark and the other co-heirs, or under a clause in the will, the effect of which is one of the matters in contest, to Mrs. Clark and the other children or grandchildren of the testator, who survived his widow. Either way, Mrs. Clark would take her share absolutely, and the Bank incumbrance would remain good after her death.

The lots 2, 3, 4, and 5 were included in the settlement made 31st July, 1857, and confirmed by the Act of Parliament, which declared that all the legal and equitable

estate, right, title, and interest of the Honorable Thomas McKay, in these and other lands, not including Lot 1, was in John McKay and Thomas McKay, and their heirs, as tenants in common; subject, however, to the estate for life or during widowhood of their mother, and with the right of survivorship between them in case one should die before the other without legal issue, before the death or marriage of their said mother. Under this title Thomas was, at the date of his will, sole owner of these four lots, and Mrs. Clark consequently took only a life estate in them.

In the formal reasons of appeal it is submitted on the part of the Bank that Thomas did not take a vested estate in what it is said the learned Judge in the Court below termed the residuary gift. Looking at the judgment alluded to, I find something said concerning a residuary gift, but I am not sure that it refers to these lots 2, 3, 4, and 5. If it does not, nothing more need be said of it, because the decree deals only with the lots 1, 2, 3, 4, and 5. If it does refer to those four lots, I shall content myself with saying that under the settlement and the Act of Parliament the lots clearly became the property of Thomas after the death of his brother John, and the question of the true construction of the will became, as to those lots, no longer material.

Mrs. McKay and her husband, though nominally respondents, support the appeal so far as it touches lot 1. Under the will of her brother Thomas, Mrs. McKay would take one-fourth of the lot in fee, and not only for life, and if the lot did not vest in Thomas she would take the same interest either under her father's will or in case he died intestate as to that land; but taking under her father, she would escape some restrictions imposed by her brother's will; she therefore supports the appeal on that point, and she also joins in asking for a partition.

I do not intend to consider the question of partition, but shall leave that as it has been left by his lordship the Chief Justice.

I propose, therefore, to confine myself to the consideration of the estate taken by Thomas in lot 1.

I do not think any difference of opinion exists as to the general rules applicable to the construction of devises such as the one before us. The divergence is more likely to be in the application of those rules to the words of the particular will.

My consideration of the will has led me to the conclusion that the estate given to Thomas in lot 1 was contingent upon his surviving at the death or second marriage of his mother. I think that construction is clearly indicated by the language employed, and is consistent with the scheme of the will to be gathered from its terms.

The whole estate, is, in the first place, devised and bequeathed to the executors in trust.

Then the trusts are declared in five clauses or sections numbered from "first" to "fifthly." The *first* provides for the payment of debts and expenses; *secondly*, a legacy of £50 is given to an hospital; *thirdly*, in the event of the testator's wife surviving him, she is given the use of the whole estate for the support and maintenance of herself so long as she shall live and remain unmarried, and of the children so long as they respectively remain with their mother and until their separate establishment in life—with a provision for paying her an annuity of £500 in the event of her marrying again. Then the section, *fourthly*, contains the disposition of the estate after the death or marriage of the widow. It is upon the construction of this section that the question I am about to discuss mainly turns. The clause *fifthly* may have some significance in connection with the interpretation of the fourth clause. Its direction is, that "in the event of my said wife dying before me, then and in that case my said property shall be disposed of at my death in the same manner as the same is hereinbefore directed and appointed to be disposed of at the death or second marriage of my said wife, in the event of her surviving me, so far as the same is practicable."

The section "*fourthly*" begins thus: "In trust also that

at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot No. 1 in (&c.), which I hereby devise to him, his heirs and assigns, to and for his and their own use forever."

Reading these words without immediate reference to legal doctrines, they seem to me clearly to import that Thomas's right to the lot is to depend upon the specified event of his being alive at the death or marriage of his mother.

The words, "which I hereby devise to him, his heirs and assigns, to and for his and their own use forever," suggest no difficulty to my mind in the way of giving their literal force to the other words, "if he be then living." I regard them as merely descriptive of the estate he is to take when the specified event happens.

The section then proceeds: "And that my sons Alexander, John, Charles, and Thomas, aforesaid, shall have and take all my other real estate in the township of Gloucester (describing it)—all which I hereby devise to my said sons Alexander, John, Charles, and Thomas, and to their heirs and assigns, to and for their own use forever, as tenants in common; subject, nevertheless, to the payment of the legacies and annuities in and by this my will bequeathed and made chargeable thereon. And that my daughters, Ann, Christine, Jessie, and Elizabeth, shall have and take all my houses, lands, tenements, and real estates in the city of Montreal, which I hereby devise to my said daughters, their heirs and assigns; to and for their own use forever, as tenants in common." These two devises are pointed to in argument as being clearly intended to be vested, and it is argued that no reason appears why the devise of lot 1 should be contingent on the survival of Thomas at the termination of his mother's estate, while these others are not made subject to any such contingency. I do not concede that the omission of the words, "if then living," in these devises, which immediately follow the devise of lot 1, would, even if nothing more appeared, be

conclusive, or that those, or equivalent words, ought not to be understood, just as we have to carry on into these devises the other words, "at the death or second marriage of my wife." But what follows appears to me to carry the same contingency into them all, while it emphasizes the earlier phrase as applied to Lot 1. The words are: "and I hereby will and direct that all the said devises in this section of my will mentioned and devised shall take effect upon, from and after the said death or marriage of my said wife, and not sooner."

This language might not, strong as it is, be sufficient to outweigh the leaning of the Court in favor of the vesting of estates, and I do not doubt that, if the context required it, the words, "take effect," might be read as pointing to a vesting in possession only, and not as postponing the vesting in interest. Yet when the testator, after expressly devising the estate in the several parcels from and after the death or second marriage of his wife, thinks it necessary to add that the devise is not to take effect before that event, I cannot suppose that he contemplated the placing of any interest in the lands at the disposition of the devisees until the period he mentioned should have arrived. Then passing on in the perusal of this fourth section, we have the declaration that all the other lands, tenements, houses, hereditaments, and real estate of what nature and kind soever should be held in trust to be sold by the executors, and the rents, issues and profits, price and proceeds thereof to be at the disposal of his wife so long as she should live and remain unmarried, for the support of herself and the testator's children (which so far is almost a repetition of what was *thirdly* already provided for), and after her death or marriage to be equally divided among the testator's children. Then the trust, that at the death or marriage of the wife all his *personal property and estate* then remaining should be equally divided among the said children, either in money or in kind as to the executors should seem best, allowing one year for the making of such distribution.

And then follows a clause which, with the greatest respect for the opinions of the learned Judge whose decision we are considering, and for those of my learned brothers who take the same view of it, I do not read as confined to the personal estate. I believe the decision of the whole matter may be said to turn upon the application of this clause, because, if I correctly understand the views of my learned brothers, their opinion that Thomas was intended to take a vested remainder in lot 1 is a good deal influenced by the absence from the will, as they read it, of any devise over in the event of his death during the continuance of the mother's estate.

I find the devise over in this clause. I see no necessity for reading it as limited in its operation to the personal estate, while the general scheme of the will, as I understand it, would, in my judgment, be frustrated by so construing it.

I shall now read the clause: "Provided always, and I hereby will and bequeath, that in the event of any of my said children dying without legal issue before coming into possession of his or her share or shares of the property or money hereby devised or bequeathed, then the share or shares of such child or children to go to and be equally divided among the survivors and the legal issue of such, if any, as shall have died leaving issue.

"And in the event of any of my said children dying before coming into possession as aforesaid, and leaving legal issue, such issue in every case to take the portion or share which would have belonged to his, her, or their father or mother if then living. And to the husband or wife of each of my said children who shall, after marriage and before coming into possession as aforesaid, die without issue, leaving such husband or wife, I give and bequeath the sum of fifty pounds annually as an annuity, payable out of and chargeable upon the share which would have belonged to such child if living."

The question is, what is meant by "the property or money hereby devised or bequeathed." I see no satisfactory reason for refusing to read the word, "hereby,"

as meaning "by this my will." It is true that the words, "property or money devised or bequeathed," would be apt words to describe the personal property and estate immediately before bequeathed in money or in kind to all the children; but they are equally apt to describe the whole estate, real and personal, dealt with in the section of the will numbered *fourthly*; and one expression, viz.: "devised" is not properly used in its technical sense, with reference to personal property. This may signify little in a will, but for whatever the distinction is worth, we so find it.

The juxtaposition of the clause with that disposing of the residuary personal estate is a mere accident, consequent upon the personal estate being the last mentioned.

Having regard to this circumstance, I do not think the position of the clause can be fairly used to influence its interpretation, or to give it the character of a proviso attached to the bequest of the one portion of the estate; but it is, at least, balanced by another fact, which I have verified by looking at the original will in the Surrogate Clerk's office, that in the original, as in the printed copy before us, the proviso is written as an independent paragraph and does not simply run on without a break in the writing. The propriety of referring to the original paper appears from a passage in 1 *Jarman on Wills*, 24, where it is said: "Certainly in recent times no hesitation has been felt by the Courts in following what is stated to have been Lord Eldon's practice, viz., in examining original wills with a view to see whether anything there appearing—as, for instance, the mode in which it was written, how 'dashed and stopped'—could guide them in the true construction to be put upon it." For this a number of authorities are cited, including *Manning v. Purcell*, 7 DeG. M. and G. 55, in which the Lords Justices sent for an original will which had not been before the Vice-Chancellor, whose judgment they were reviewing.

Looking at the section "*fifthly*," which I have already quoted at length, we have the direction that the testator's *said property* shall be disposed of at his death, in the

event of his wife predeceasing him, in the same manner as directed at her death or marriage.

There is nothing here to suggest the restriction of the words "my said property," in this section, to anything less than the whole estate.

When making his will the testator had evidently several possible events before his mind. His wife might or might not survive him. If she survived him the estate was to be distributed at her death; if she predeceased him it was to be distributed at his death. In either case the same principle of distribution was to prevail.

At the period of distribution all his eight children might be alive or some of them might be dead without leaving issue, some of them perhaps leaving a husband or wife, and some might have died leaving issue. It is clear that all these events were in his contemplation, and it is to my apprehension also clear that he intended his bounty to reach his grandchildren, whose parent, his son or daughter, might be dead, whichever of the two periods should happen to be that of the distribution.

Suppose it to have been at his own death, his wife being already dead and one of his children—say, for example, Thomas—having died before his mother, leaving issue. A possible case such as this was, I apprehend, one of those intended to be provided for in section *fifthly*. In such a case what would the issue have taken? Plainly, I think, just what their father would have taken; and this (still referring for the sake of illustration, to Thomas) would have been Lot 1, the share of the other Gloucester lands, and the share of the residuary lands and personal estate.

We cannot hold that the supposed issue of Thomas would have taken a more limited share of the estate without admitting an intestacy, as to at least lot 1; or, if we could hold it to fall into the residuary lands that were to be sold, assuming an intention to divert from the grandchildren what the parent was to have taken, no such intention is to be collected from the will, as I understand it. But that which would thus fall to the children under

section *fifthly*, was to be the same benefit allotted to them under the preceding section, in the event of the widow surviving and her son dying in her lifetime, leaving issue.

Thus, it appears to me that (without giving just cause for the charge of reasoning in a circle), we may properly use section *fifthly* to aid or confirm the interpretation of the preceding section, by shewing the contemplation that, at the period of the distribution, the children of a deceased parent were intended to take by direct devise or bequest, which would not be the case if the property vested in the parent.

I concur with his lordship the Chief Justice in thinking we should allow the appeal.

The Court being equally divided, the appeal was dismissed, with costs out of the estate.

WILSON V. BEATTY—IN RE DONOVAN.

Administrator pendente lite—Solicitor of administrator—Costs paid to solicitor—Liability of solicitor to refund.

In an action instituted by the widow of T. W. to set aside a will alleged to have been executed by him under undue influence, D. acted as her solicitor and obtained a decree as prayed. During the pendency of such action one H. was appointed by the Court administrator with the view of getting in certain debts due the estate before being barred by lapse of time. Numerous actions were brought by D. in the name of H., in some of which moneys aggregating a large sum were recovered, whilst in many no benefit whatever resulted to the estate, and costs amounting in the whole to \$2,738.37 were incurred, which had been taxed as between solicitor and client, on H. passing his accounts before the Master, and were paid to D. partly by H. out of moneys of the estate, and partly by funds coming into D.'s hands as such solicitor and retained by him. Subsequently a prior will of T. W. was duly proved by the executors named therein, who took proceedings to obtain an account of H.'s administration and a taxation of D.'s costs. These proceedings finally resulted in a dismissal thereof as against D., and an order on H. to pass his accounts, which he did, charging the estate with the amount of costs so paid to D. but on a retaxation of D.'s bills the aggregate amount was reduced to \$725.56, several of the bills having been disallowed *in toto*, on the alleged ground that the actions had been brought without the leave of the Court, and H. was ordered to pay in the difference. H. was unable to do so, and thereupon he, as also the executors, by their several petitions applied for and obtained an order upon D. to repay the amount with costs, or in default be struck off the roll of solicitors. (29 Gr. 280.)

On appeal this order was reversed, [SPRAGGE, C. J., dissenting] the Court being of opinion that the taxation and all the other proceedings in reference thereto having been had in a proceeding to which D. was not a party, he could not be bound thereby.

Per SPRAGGE, C. J. O. Under the circumstances appearing in the matter an order to strike D. off the rolls in case of non-payment was not called for.

BERNARD HALDAN, the administrator of the estate of Thomas Wilson, deceased, appointed by the Court of Chancery *pendente lite*, employed one Donovan, a solicitor, to collect the outstanding assets of the estate; and several actions were instituted for that purpose. Haldan was cautioned by one of the sureties to his administration bond, not to bring such actions, or permit Donovan to do so, without having first obtained leave of the Court for that purpose. Haldan thereupon consulted Donovan on this objection, who advised him that not only was such

leave not necessary, but that an application to the Court for that purpose would not be entertained, and would expose him to rebuke for incurring such expense.

Some of the actions were beneficial to the estate, and resulted in large sums being recovered; others, up to the time when the management passed from the hands of the administrator *pendente lite* were without profit to the estate.

Donovan presented bills of his costs to Haldan, who, when passing his administration accounts before the Master, pursuant to an order of the Court, had them taxed, as between him and his solicitor, and paid Donovan the balance remaining due upon such taxation.

Subsequently a will of the deceased having been admitted to probate, Charles Beatty and James Wilson the executors instituted proceedings in the Chancery Division against Haldan and Donovan praying an account of Haldan's administration, and for taxation of Donovan's costs. At the hearing the bill was dismissed, but upon appeal to this Court the dismissal was reversed as to Haldan, and he was ordered to pass his accounts before the Master, and have Donovan's costs taxed in presence of the executors. On such taxation Donovan's costs were in great part disallowed, seemingly for the reason that the suits and actions which were without benefit to the estate had been brought without the sanction of the Court. Haldan did not appeal from the ruling of the Master, and at the hearing on further directions a decree was pronounced ordering him to pay into Court the sum so disallowed in respect of Donovan's costs; also to pay the costs of the suit.

Haldan was unable to pay the sum so ordered, but subsequently he and the executors presented each a petition in the Chancery Division against Donovan, praying that the moneys paid to him by Haldan in respect of his costs might be declared trust-moneys of Thomas Wilson's estate, which Haldan had no right to pay to Donovan in excess of the amount of costs so allowed to Haldan, and that Donovan might be ordered to pay into Court the sum

so charged against Haldan, together with the costs of suit which Haldan had been ordered to pay.

The petitions were heard before Proudfoot, J., and an order granted in accordance with the prayer of the petitions; together with the costs of one petition.

The other facts appear sufficiently in the report of the case, 29 Gr. 280, and the present judgments.

Donovan appealed from that order, and the appeal came on to be argued on the 15th and 16th September, 1882.*

Donovan, the appellant in person. Haldan's petition alleges no reason, applicable to the appellant, for recovering back the moneys paid him for services rendered, except that in a suit by the executors against Haldan, to which the appellant was not a party, and in an accounting in that suit, Haldan was found indebted in respect of his administration. The fact of Haldan being administrator does not exonerate him from liability to those with whom he contracts in respect of matters relating to the estate he is administering, nor does it entitle him to reclaim moneys paid in regard of obligations so incurred.

Creditors of the administrator for services rendered to the estate have no rights against the estate as regards payment, but must look to the administrator. The moneys of the estate were trust-funds as between the administrator and the executors: but bore no such character as between the administrator and the appellant. There is no mutuality of right and risk between the administrator and his solicitor and the estate, which would permit an administrator to pay to the solicitor only such sum as he himself would be allowed in his account with the estate. Haldan was an ordinary administrator, though appointed by the Court of Chancery, and was only an officer of that Court in the same sense that every administrator is an officer of the Court which appoints him.

What took place in the suit of the executors against

**Present.*—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON, and PATERSON, JJ. A.

Haldan is not binding on the appellant: it is *res inter alios acta*; yet the petitions herein, and the judgment pronounced upon them, assume it to be *res judicata* against him.

As regards the petition of the executors, there is no precedent of such a proceeding by *cestuis que* trusts against the solicitor of their trustee. No privity exists between them and the appellant. Their former suit against the appellant seeking the same relief as their petition now prays, was dismissed by this Court, 4 A. R. 249. The order made on their petition virtually overrides that decision. The appellant is in no manner accountable to the executors; and is not bound by their judgment against the administrator.

Muclennan, Q.C., and O'Donohoe, Q.C., for the respondents Wilson and Beatty.

Moss, Q.C., and Morphy, for respondent, Haldan.

On behalf of the respondents it was contended that the evidence in the cause clearly established that the money asked by them to be repaid by Donovan had been obtained by the appellant under circumstances which disentitled him to make any claim thereon for costs or otherwise, and the strict rights of the parties required that he should be ordered to refund the amount. This money, it was shewn, was composed of assets of an estate of which the Court had assumed the administration, at the instance of the appellant acting as solicitor for the plaintiff in that cause, Mary Ellen Wilson, and could not be applied by him or the administrator *pendente lite* to the payment of costs, or otherwise dealt with, without the authority of the Court; and it is shewn that the appropriation thereof by the appellant was not sanctioned in any way by the Court. They also insisted that as the several suits referred to in the petitions had been carried on by the appellant in the name of the administrator, without the leave of the Court, which, they urged, ought to have been obtained, the Master was right in disallowing the costs incurred in respect of

them, and that it was the duty of the appellant, as the solicitor and adviser of the administrator, to have informed him that such leave was necessary. Having neglected this duty and advised the contrary, and the costs having been in consequence disallowed to the administrator on passing his accounts, they could not form a claim against the administrator personally. No proof was given before the Master that the appellant had been retained by the administrator, neither was there any evidence that the administrator intended to be responsible for costs not payable by the estate; the intention clearly was, that the appellant should not look to him otherwise than in his character as administrator; and he was not under any obligation to assume any greater liability, being merely an officer of the Court, and the appellant as his solicitor was bound to have advised him to that effect. The evidence shewed that the appellant was aware at the time he obtained the money that the administrator was not possessed of means to enable him to make good the amount to the estate in case he should be called on to pay it, and writs of execution subsequently issued against him therefor were ineffectual; this, together with the improper means adopted by the appellant to possess himself of the money, as set forth in the petitions and proceedings, obviated the objection of want of privity; but whether this was so or not, none such could possibly be taken to the petition of the administrator, the relationship between them being that of attorney and client: and it was submitted that the jurisdiction of the Court to follow trust funds wherever found, entitled the executors of Thomas Wilson to make the application against the appellant, especially as he was the solicitor having the management of the cause in which the decree was made for the administration of the estate, and had possessed himself of the trust moneys with the knowledge that they were impressed with that character, and payable into Court with the other moneys of the estate, for the benefit of the parties for whom the petitioners Beatty and Wilson were trustees, under the will of Thomas Wilson.

That the appellant being a solicitor of the Court, and the matters complained of in the petitions having arisen in conducting a cause in his professional capacity, he became subject to the summary jurisdiction of the Court, and the manner in which it had been exercised in making the order against him was in accordance with the practice of that Court, and would not now be interfered with.

They also contended that if the money in question was paid to the appellant by the administrator who was the custodian of the trust funds, it was a breach of trust; and as the appellant advised the act and took the benefit thereof, he could not shield himself from the usual consequences by means of a set-off as he proposed to do, but was subject to a summary application by any of the parties interested in the estate to compel payment into Court.

Harris v. Rees, 16 W. R. 91; *DeWinton v. Mayor of Brecon*, 6 Jur. N. S. 1046; 28 Beav. 200; *Re Cullen*, 27 Beav. 51; *Re Spencer*, 39 L. J. Chy. 841; *Rolfe v. Gregory*, 11 Jur. N. S. 98; *Frith v. Cartland*, 2 H. & M. 417; *Thompson v. Finch*, 25 L. J. Chy. 681; *Washburn v. Ferris*, 14 Gr. 516, and 16 Gr. 76; *Ex parte Yalden*, 4 Chy. D. 129; *Bulkley v. Wilford*, 2 Cl. & F. at 177; *In re Downes*, 4 Drew 427; *Maw v. Pearson*, 28 Beav. 196; *Crooks v. Crooks*, 1 Gr. 57; *Fyler v. Fyler*, 3 Beav. at 568; *Ezart v. Lister*, 5 Beav. 585; *Re Martin*, 6 Beav. 337; *Re Becker*, 18 Beav. 462; *Re Chandler*, 22 Beav. 253; *Re Ward*, 31 Beav. 1; *Beatty v. Haldan*, 4 A. R. at 247; *Re Eccles, &c.*, 1 Chy. Ch. 263; *Bethell v. Abraham*, L. R. 17 Eq. 24; *Thompson v. Miliken*, 13 Gr. 104; *Re Hardy—Poole v. Poole*, 3 Chy. Ch. 179; *Re Street*, L. R. 10 Eq. 165; *Re Dickson*, 3 Jur. N. S. 29; *Watson v. Bodwell*, L. R. 7 Ch. D. 625; *Lewin on Trusts*, pp. 156, 478, 650, 728; *Kerr on Frauds*, 312, 326; *Dan. Ch. Pr.* 1598, were referred to.

October 27, 1883. SPRAGGE, C. J. O.—I have had the advantage of perusing the judgments prepared by my learned brothers Burton and Patterson, and concur with them in opinion that the taxation under the order of November 27,

1879, reducing the bills of costs of the solicitor, Mr. Donovan, to the sum of \$725.56, proceeded upon the erroneous principle that it was necessary that the administrator *pendente lite*, should, before commencing suits for the recovery of the assets of the estate of which he was such administrator, have obtained the authority of the Court for the institution of such suits, and that costs incurred in the prosecution of such suits ought to be disallowed. The consequence has been that the administrator has been allowed in passing his accounts the above reduced sum only, instead of being allowed for all costs properly incurred in such suits, as an ordinary representative of the estate would be entitled.

One great difficulty upon these applications is, that in both the petitions that have been presented, as well in that of Haldan, the administrator, as in that of the present representatives of the estate, it is assumed that the so-called taxation proceeded upon a correct principle; and that it is binding upon the solicitor as well as upon the administrator; and the relief prayed proceeds upon that assumption. I use the term, "so-called taxation," because although the term taxation is used in the order of the above date, and in the certificate of the Master, the thing to be ascertained was not what amount the solicitor was entitled to, but what amount the administrator was entitled to in respect of the costs of the solicitor, in passing his accounts before the Master.

I do not know whether the solicitor was present upon that occasion. The certificate says that what was done was in the presence of the solicitors for all parties interested, which would be the case if Donovan was present as solicitor for Haldan only, and it would not follow that the certificate would be binding upon him, the solicitor, so as to affect his right to costs as between himself and the administrator, or to give the executors to whom the administrator was accounting any right or claim against the solicitor in respect of the costs.

I have since ascertained that Mr. Donovan was present at these so-called taxations, and that his attendances are

marked as being as solicitor for the administrator, except on one occasion, when it is noted as being on his own behalf as well as solicitor for the administrator.

The judgment of my brother Patterson states the facts so fully and clearly that it would be worse than useless for me to recapitulate them.

It appears then from the facts of the case, and our opinion upon the law applying to them, that the petitions proceed upon a misconception on two points, one that the proceeding before the Master to ascertain what was properly allowable to the administrator in respect of the solicitor's costs, proceeded upon a correct principle in the disallowance of a large class of costs; the other point being that the proceeding was binding upon the solicitor.

Both of the petitions are directed against him personally, and the order made upon them in the Court below for striking him off the rolls in case of non-payment of the amount directed to be paid was, we think, an order not called for by the circumstances of the case.

At the same time there are considerations which should induce us to give relief, if we can do so, without infringing the rights of the solicitor whatever they may be, and without unduly straining the rules and practice applicable to such cases.

There is before us the broad fact, and it is a startling one, that while the solicitor has received and retains in his hands the sum of \$2,350 for costs of proceedings, as solicitor for the administrator, the administrator has been allowed only the sum of \$725, in respect of the same costs; the difference being out of the pocket of the administrator—a dead loss to him, the solicitor having received for certain services for the estate all that sum more than the administrator has so far been able to charge against the estate for the same services; and both of these persons being in respect of these services for the estate officers of the Court of Chancery.

It is further to be considered that all the proceedings in which the costs were incurred were taken by the adminis-

trator under the advice of the solicitor ; that advice being followed implicitly. It is indeed not too much to say, for the evidence warrants it, that the proceedings were taken by the solicitor rather than by the administrator, the latter concurring in whatever was proposed by the solicitor.

That under these circumstances the solicitor should receive and retain three times the amount of costs that his client has been able to charge against the estate would appear to any layman simply unaccountable. The inevitable inference would be, that there must be a great wrong somewhere.

Do we find then upon examining these proceedings that the solicitor has been blameless in the transactions to which they relate ? I do not know that he gave unsound advice as to the institution of suits, or that he committed any wrong in their prosecution ; the fact may be so, or it may be otherwise ; but we do find that he placed his client in the false position of claiming against the estate costs received and retained by himself, vouched by a taxation which has been stigmatized by this Court as little better than a travesty of fair accounting ; and we find that he still retains in his hands the costs taxed upon that colorable taxation, although it has been set aside as establishing no claim against the estate. I put it to him upon the hearing of these petitions, whether he was willing now to have his costs taxed ; and he declined. In good conscience he cannot, under the circumstances which appear clearly in this case, claim to retain costs on the ground that they were allowed to him upon that taxation ; for, as put in the judgment to which I have referred, "the solicitors who appeared at different times for Mr. Haldan were really nominated by Mr. Donovan." The administrator, layman as he was, would naturally stand indifferent as to what was taxed. The taxation was not to ascertain a sum which he was to pay, but to fix an amount for which, whatever it was, he would naturally assume he was to be allowed in passing his accounts. For the solicitor to insist upon such a taxation as a taxation between himself and his client is to my

mind simply absurd, it was *alio intuitu*, and in my opinion entirely inadmissible as a taxation binding upon the administrator.

I think, further, that the solicitor does not stand before us blameless in this. He was right or wrong in the advice given by him that the administrator might properly take the proceedings which he did take without obtaining the previous authority of the Court; we think that he was right upon that point. But there is a passage in the judgment from which I have quoted which has been interpreted as intimating a contrary opinion. Whether the Master in disallowing that class of costs proceeded upon his understanding of that judgment, or upon his own judgment, we are not informed; nor do we know how the solicitor himself interpreted the passage in the judgment of this Court to which I have referred. Take it that he understood it as an expression of opinion that the previous authority was necessary, in that case he would understand that the advice that he had given to his client had been held judicially to be erroneous; or again, suppose that he did not so understand the judgment, he would understand that the Master proceeded in the disallowance of these costs upon his own judgment which was opposed to the advice that he, the solicitor, had given to his client. In the one case he would see that he had been wrong, or, at least, would understand that it had been so judicially determined. In the other case he would have against his own opinion that of the Master only, or as the fact appears to be, of the taxing officer only. And it is to be remembered that he had given to his client a very strong and decided opinion upon the subject; and that, after being informed by his client that other professional men thought differently. We think, as I have said, that his opinion upon the legal point was right; and we should assume that he interpreted rightly not wrongly the passage in the judgment of this Court, and so did not understand that there was any judicial expression of opinion against his own view of the law. If so, there was the opinion of

the taxing officer only ; and if he accepted that as conclusive, it was scarcely doing justice to his client under the circumstances, bearing in mind the decided opinion that he had entertained, and upon which he had advised his client ; that his client had incurred a very large amount of costs in reliance upon that opinion ; that he had reason to believe his opinion to be right, for in fact it was right ; and bearing in mind also that his acceptance of the decision of the taxing officer involved the loss to his client of a large amount of costs, which costs were in his own pocket. I do not say that he was bound to appeal, or to advise an appeal from the decision of the taxing officer, or that he may not have had a strict legal right to retain the costs that he had received. I only say that if under these circumstances, and in view of the disastrous consequences to his client involved in the decision of the taxing officer, he accepted that decision without question, it indicated an apathetic indifference to the interests of his client which we may look at in considering whether it is just that the taxation upon which he relies should stand, or be opened and may look at it also upon the question of costs.

There is, I think, no difficulty in seeing what ought to be done, in order to do justice to all parties. What difficulty there is is occasioned by the shape of the proceedings that are the subject of this appeal. What ought to be done is this :

The order of this Court, in *Beatty v. Haldan* should, so far as it relates to the costs of the solicitor, be varied. Instead of directing that the bill of costs of the solicitor should be referred to the Master to tax and moderate, the reference should be to ascertain and report what is properly chargeable by the administrator against the estate of the testator, in respect of legal proceedings in the Courts or otherwise, taken by him as such administrator.

The so-called taxation should be vacated ; and the inquiry that I have indicated should be substituted for it.

The previous taxation of costs, for the purpose of charging therewith the estate of the testator, and which by the

order of this Court in *Beatty v. Haldan* was held to be not binding upon that estate, should be declared to be not binding upon the administrator. I have already given my reason for holding it not so binding. There should be a new taxation between the solicitor and the administrator. It may be found that the solicitor is entitled to the full amount at which his bills have been taxed on the former occasion; or it may be more, or it may be less.

The effect of varying the order in *Beatty v. Haldan* would be to decrease the amount with which the administrator now stands chargeable to the estate of the testator; and it is just that it should be so, for he ought to be allowed for all costs properly paid to his solicitor, and we see that this has not been done; for a whole class of costs has been disallowed which in our judgment ought to have been allowed, unless, there were grounds for their disallowance, other than that for which they were disallowed, all which would be proper for the consideration of the Taxing Officer.

The principle upon which the allowance should be made in the account with the estate, and the principle upon which the taxation should proceed between the solicitor and the administrator, are very clearly stated by Lord Romilly in *Re Brown*, a solicitor, L. R. 4 Eq. 464.

The rights of all parties could thus be adjusted, and I think without any serious difficulty. The difficulty is in directing all this upon these proceedings.

The petitioners make common cause against the solicitor; and in both petitions it is assumed that \$725.56 is the amount, and the whole amount that the administrator is entitled to be allowed as against the estate for costs. We find this to be an error, or at any rate founded upon error. But here there is really a conflict of interest between parties who are proceeding before us as having an interest in common. It becomes a case of a claim by Haldan against the estate of the testator, while his petition asks nothing against the estate, but against the solicitor only. We cannot therefore, upon these proceedings, make any order that would exonerate Haldan and onerate the estate in respect of the transactions between them.

Then can we grant any relief in favour of Haldan as between himself and his solicitor, *i. e.*, upon these proceedings? Haldan's petition does not ask for a taxation of his solicitor's bills of costs. It assumes that there have been two taxations, the first an improper one, and the second a proper one, and asks relief upon the foot of the second taxation. In my opinion, neither the first nor second so-called taxations was a taxation in the proper sense of the term. But still Haldan's petition treats them as such. Is that conclusive against our dealing with them upon the footing of what we really find them to be?

The whole of the facts in relation to the dealings between these parties are before us upon these proceedings; but the petitioner is mistaken in his law. He asks for something to which he is not entitled, and does not ask for that to which he is entitled—not even in the shape of a prayer for general relief. Still we see that upon the facts before us he is entitled to something: to a something less than he asks for.

I incline to think that we may. In the first place, the granting the relief that I think he ought to have would not, as a matter of pleading, be a surprise upon the solicitor. Haldan impeaches the first taxation, successfully as I think; and then assumes that a second was correct and binding, erroneously as I think. If he had stopped with his successful impeachment of the first he would have been right. The solicitor insists upon the first. Upon that the two are at issue, and upon that issue the finding should be for Haldan; and if there was no second binding taxation—and the solicitor says there was not—the finding in respect of the first should entitle Haldan to a retaxation, or, as I should say, to a taxation; and I say this because there was not, and was not meant to be, any taxation between the solicitor and the client.

If Haldan's petition had contained the usual prayer for general relief, as the petition by *Wilson et al.* does, I think it clear that he would be entitled to a taxation of the solicitor's costs. If this had been a bill in the Court of

Chancery, he would I conceive, be so entitled. The rule in the case of bills is thus put by Sir John Leach in *Wilkinson v. Beul*, 4 Mad. 408. "If a party prays particular relief to which he is not entitled, he may nevertheless, under the prayer for general relief, have such relief as he is entitled to, upon the case alleged and proved?" The rule is thus stated by Lord Erskine, in *Hiern v. Mill*, 13 Ves. at 119: "If the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer; but he cannot desert specific relief prayed and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief."

These cases are cited by Lord Redesdale and by Story in their treatises on Equity Pleading; and after stating that the relief must be agreeable to the case made by the bill and not different from it, they say, and the Court will not in all cases (Story says ordinarily) be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced. I do not think that the prayer of this petition being in the shape that it is can have operated to the prejudice of the solicitor; or that it has been any surprise to him, or that it has induced him to meet the petitioner's case or to frame his own case differently from what he would have done if the petition had contained an alternative prayer or a prayer for general relief; he would, whatever the prayer, have insisted as he did insist at the hearing upon the finality of the taxation impeached by the petition. If we dismissed the client's petition upon this question of pleading, it ought to be, I should say, certainly without prejudice to his filing another, and I do not think, in view of who are the parties to this litigation, and the time and money already spent upon it, that it is necessary to the ends of justice to put him to that course.

Further. The case may be taken to present this aspect.

The so-called taxation of 20th June, 1880, reducing the solicitor's costs to \$725.56, was altogether erroneous. It cannot be sustained, as of course the solicitor contends, and rightly. Accepting his contention we are thrown back upon the so-called previous taxation. That taxation is impeached as well by the petition presented by the executors of the estate, as by Haldan's petition. Assuming for the moment that it might stand as a taxation between the solicitor and his client Haldan, it would be a question whether it ought not to be opened at the instance of the executors under what are called the third party clauses of the Attorneys' Act, R. S. O. ch. 140, secs. 143 and 144, following the English Solicitors' Act of 1843. The "special circumstances" are, in my opinion, quite sufficient to bring it within the latter section.

The judgment of this Court in *Beatty v. Haldan and Donovan*, dismissing the bill as against Donovan, can be no bar to a proceeding by the same parties against Donovan under the clauses of the Attorneys' Act to which I have referred. The bill was dismissed as against Donovan, solely on the ground of want of privity between the plaintiffs and him; and upon the authority of *Pearson v. Maw*, 28 Beav. 196. In *Pearson v. Maw*, the argument for the solicitor, the demurring defendant, was, that his bills of costs might be taxed under the Solicitors' Act, and that a suit for that purpose was wholly irregular. The decision went chiefly upon the ground, as did the cases cited in the judgment, of the extreme inconvenience of holding a *cestui que trust* entitled to make sub-agents parties. Yet it was intimated that if the solicitor had improperly obtained trust funds from the trustee, knowing that the trustee was unable to repay them, or if it were impossible to get them back from the trustee, there might be a case. The Attorneys' Act, I may observe, was not referred to in *Beatty v. Haldan*. If it had been referred to by the plaintiffs, the answer would probably have been that the solicitor's bills were taxable, under the Act, and that a suit for the purpose was irregular; as was said in *Pearson v. Maw*.

The passage in *Willams* on Executors, p. 1717, quoted by my brother Patterson, is upon the authority of *Johnson v. Telford*, 3 Russ. 477, decided several years before the passing of the English Solicitors' Act.

It may also be a question whether Mr. Donovan does not, as to that portion of the estate received by him from the Hon. Frank Smith, come within the exception stated by Lord Selborne, in *Barnes v. Addy*, L. R. 9 Chy. 251. "But on the other hand, strangers are not to be made constructive trustees, merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a Court of Equity may disapprove, unless (and here is the exception) *those agents receive and become chargeable with some part of the trust property*, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

I think, as I have said, that there are special circumstances in this case for the opening of this taxation at the instance of the estate. Upon the petition of Haldan there is the further and broader ground that in no proper sense of the term has there been a taxation of costs between solicitor and client, and no taxation of that nature and character was ever intended, certainly could never have been understood by Haldan. This does, I must say, appear to me very clear

What I have suggested as proper for the adjustment of the rights of all parties cannot be carried out upon the pleadings and proceedings now before us. It is to the interest both of the administrator and solicitor that it should be carried out; and would be no unfair detriment to the estate. If those representing the estate should not feel at liberty to accede to this, it would be proper to allow a short petition to be presented on behalf of Haldan, referring to the proceedings now before us, and praying for the relief that I have indicated as proper, or such other relief as he may conceive himself entitled to.

I suppose it cannot be doubted that the Court of Chancery had the power to open this so-called taxation if the

interests of justice required it, and that this Court may do what it was proper for the Court of Chancery to do.

I regret very much that I am unable to agree with my learned brothers as to the way in which these petitions should be dealt with. With great deference to them, I cannot help retaining the opinion that I have expressed that while the petitioners have themselves made great difficulties in the way of the Court granting them relief, those difficulties are not insuperable, and that we may properly grant them relief upon these petitions. I should myself have granted the petitioners Beatty and Wilson relief under the Attorneys' Act; and although that specific relief is not asked for in the prayer of their petition the facts stated and proved do, in my opinion, shew them entitled to it, and their petition contains the usual general prayer; and I should have granted relief to Haldan from the first taxation of his solicitor's bill, in the mode that I have already indicated; and as to costs, I should have given none to any of the parties.

My learned brothers and myself differ probably but little if at all as to the rights of the parties, our difference is as to how these petitions should be dealt with. Any order that may be made should be expressed to be without prejudice to any application that the petitioners or any of them may be advised to make in relation to the matters contained in their petitions.

I apprehend that there can be no question that the evidence used upon these petitions may be used in any future proceeding between the same parties. I had occasion to consider that question in *Adamson v. Adamson*, 28 Gr. 224.

BURTON, J. A.—One cannot avoid seeing that although the names of the executors and beneficiaries under the will of the late Thomas Wilson are used in one of these applications, they are used in the interest of the sureties for the administrator, Mr. Haldan, and that the application itself, and the very stringent order which has been granted, were made and obtained entirely in the interest of the

sureties, and upon an indemnity furnished by them to the petitioners.

The proceedings themselves are also, I think, somewhat unprecedented, the order complained of having been granted upon both petitions, which for that purpose were consolidated, although I think it clear that whatever view may be taken of the order on the petition of the executors, the attorney was clearly entitled to have the petition filed against him by Haldan dismissed with costs.

That gentleman, in his answer to the bill in *Beatty v. Haldan*, states :

“ That all the moneys collected by him as administrator of the estate had, with a trifling exception, to be collected through legal process, and various suits and actions were brought with that object, but no suit was, I verily believe, brought wantonly or with any other motive than to further the best interests of the estate, and proper and competent advice was always taken before bringing any suit, and the utmost care was observed in guarding the said estate from loss.”

And again :

“ It is a mistake to suppose that I was a puppet in the hands of Mr. Donovan, and that I allowed him to use my name for his own benefit,” and he also says that he “instructed Mr. Cassels to look narrowly into Mr. Donovan’s charges,” as he thought them excessive.

He admits what if true he must have been aware was a highly improper transaction, viz., an agreement to share the commission with Donovan, which it is but fair to that gentleman to say that he denies.

He says, however, he was misled by Donovan into the belief that the sanction of the Court was unnecessary before the institution of any suit, and that the costs have been disallowed by reason of these suits having been brought without such authority, and the estate having derived no benefit from the litigation

Whether such authority is necessary in the case of an administrator *pendente lite* has not been shewn by any

decided case. The learned Vice-Chancellor seems to have considered that such was decided or resulted from the decisions of this Court, in *Beatty v. Haldan*, but no such point was intended to be decided, and the language of the Chief Justice was, I think, intended to convey a contrary impression. He points out, that although an officer of the Court he was liable to have suit brought against him to account, and referred to the case of an ordinary administrator, who before the Probate Act of 1857 in England was spoken of in Williams (*Williams on Executors*, 403), as an officer of the Ordinary, and is an officer of the Court by whom he is appointed.

The position is widely different, in my opinion, from that of a receiver, whose duties are generally confined to taking charge of and preserving certain specified property referred to in his appointment, and which by the same order that makes the appointment the parties in possession of are ordered to deliver over.

Here the Court of Chancery, with its usual care and vigilance, presumably approved of and selected a discreet and proper person to fill the appointment—an appointment to which the statute attaches all the rights and powers of a general administrator, other than the right of distributing the residue—and then directed the security which should be taken for the due and faithful exercise of those rights and powers : and it would, in my opinion, be almost farcical to hold that an officer whom the law intended to entrust with such large powers, and who is bound to give security for the faithful performance of such powers, should be under the necessity of running to the Court, at the expense of the estate, each time he desired to bring a suit. It would not only be attended with great and unnecessary expense, but would entail this additional disadvantage, that whilst the Court could only act upon the material brought before it, it would thereby sanction the expenses of litigation which might prove fruitless, whereas I assume that it would always be in the power of the Court when passing an executor's or administrator's accounts, to disallow

expenses recklessly incurred in suits which have resulted in no benefit to the estate.

I have not overlooked the concluding portion of the section, which, after defining the administrator's powers, declares that he shall be subject to the immediate control of the Court and act under its direction; but I have endeavoured to shew that this is nothing more than has always been the case, even in the case of a general administrator. On the termination of the litigation his functions cease, and he is then bound to obey the directions of the Court as to the disposition of the funds, but having all the powers in other respects of a general administrator. I should desire some express decision binding upon us before I would concur in holding that he could not institute a suit without subjecting himself to the *certainty* of his costs being disallowed in the event of his failing to realize anything from the litigation for the estate, although it may be, as is contended here, that the estate has passed out of his hands, and that by proper efforts something might have been obtained upon the judgments in which the costs were incurred.

If, as is alleged, the taxing officer proceeded to disallow these costs on the ground that the sanction of the Court was not obtained, I think he was in error, and that he should have proceeded precisely in the same manner as he would have done in passing the accounts of any administrator duly appointed to the administration of an estate; that the same rule is applicable whether he be appointed generally or for a limited period, or until the occurrence of a particular event.

But it may be said with truth if the taxing officer has erred there should have been an appeal, but the person so to appeal was Haldan, not the solicitor, who was no longer a party to the suit.

It is sworn by the solicitor that upon the objection being mentioned to him that the sanction of the Court was necessary, he made inquiry to ascertain if such a practice obtained, and satisfied himself that it did not.

Dealing then with this petition alone, we have not to consider what a person of a nice sense of honor would feel it incumbent upon him to do where his client acting upon his advice, erroneous or otherwise, had suffered a loss, but whether upon the principles governing summary applications of this nature a case has been made out for an order to refund, attended with the serious consequences to the solicitor contained in this order.

According to Mr. Haldan's own evidence, the first taxation was conducted by Mr. Cassels under direct instructions from himself to tax them rigidly, and the appellant urges that the cross-examination of Mr. Haldan was omitted from the appeal book in *Beatty v. Haldan*, which he contends would have shewn that the remarks of the late learned Chief Justice of this Court in reference to the illusory character of that taxation would have been shewn to be unwarranted. Be that as it may, it would scarcely lie in Mr. Haldan's mouth to question its correctness, and so far as it applies to this appellant that is the only taxation of these bills which has taken place.

If Mr. Haldan, satisfied with the correctness of the last taxation, did not choose to appeal, the proper course would seem to be to have made it a ground to re-open the taxation of the bills which had previously been allowed, and to have afforded the appellant an opportunity to have resisted that application, and, if granted, to have been present at such retaxation. If upon such taxation an amount had remained over and above the sum allowed in his hands, he might have been entitled to an order for payment, but it would seem to me to be contrary to the spirit in which the Court is accustomed to exercise its summary jurisdiction over its own officers to make the order in question, until it had been ascertained upon a reference to which the solicitor was a party that a proper taxation had taken place, and that he was wrongfully withholding moneys to which the petitioner was entitled.

I shall presently deal with the other petition, but before doing so I wish to refer to the case of *Crooks v. Crooks*,

reported in 1 Gr. 57, which the learned Judge considers an authority for the position that the executors in a case like this can get the relief they seek by petition. I have read that case with great attention, but I am unable to trace any analogy between it and the present case.

In that case the plaintiff for the protection of his own estate obtained the interposition of the Court by injunction, restraining all creditors from enforcing their executions, and realizing their debts from the estate.

Subsequently he proceeded, with the assistance of the same solicitors who had obtained the injunction, without the sanction of the Court to sell a portion of the estate, the price of which the plaintiff and the solicitors divided between themselves, instead of paying it into Court or among the creditors, whose executions were stayed. There could be no question of the solicitors having been guilty of a contempt of Court for which they were liable to be committed, and they might have congratulated themselves on having escaped, as they did, with a mere order to pay the amount into Court, and to pay the costs of the proceedings.

I can see no analogy between such a case and the present. The administrator was appointed for the express purpose of getting in the debts, and to employ a solicitor, if necessary, for that purpose, and if he had in good faith paid a solicitor his proper charges he would have been allowed them upon passing his accounts. He did pay the account submitted from funds properly applicable to that purpose, but the Master has now rightly or wrongly disallowed a considerable portion on the ground that the actions were brought without the sanction of the Court, and the estate has derived no benefit from them. That may or may not be right, the administrator by not appealing admits its correctness, but that act is not binding on the appellant here, and possibly he may be entitled under his retainer from Haldan to tax them against him, and to retain therefore the amount paid; but I am unable to understand how this application can be sustained in the

face of the decision of this Court, when the suit of *Beatty v. Haldan* was before us, and we decided that no relief could be sought by these same petitioners against the solicitor in a suit—the Chief Justice remarking if Haldan has improperly paid him costs out of the assets of the estate the former is liable, and they must settle the matter between themselves. A distinction was attempted to be drawn by shewing that two sums of \$1,000 and \$2,100 never passed out of the solicitor's hands, but I do not see that that can make any difference. Whether it was paid over to the administrator, and then paid to the solicitor for costs, or was with his sanction retained as costs, can make no difference. In this case the costs as originally taxed amounted to something over these amounts, and after crediting them the administrator paid him \$170.

There may be cases no doubt in which a person in possession of trust funds improperly obtained or withheld may, as suggested in the case of *Beatty v. Haldan*, be made a party to the suit as well as the trustee, but I am unable to see how, this case would differ from *Maw v. Pearson*, if it were a bill filed for the purpose. In the present case the trustee was bound to give sureties who are responsible for his defaults, and therefore the reason suggested by the learned Judge fails.

The distinction seems to be well taken in *Attorney-General v. The Earl of Chesterfield*, 18 Beav. 596—there the case of a charity: “that if a stranger has property belonging to a charity in his possession, and refuses to deliver it up, he makes himself a *quasi* trustee; and although a self-constituted trustee he is a proper party to a suit instituted by the Attorney-General, whether *ex officio* or at the relation of private individuats, to compel him to account for or to deliver up the property.” But the case is very different where, as here, the person in possession of the property is the mere agent of a trustee. In such case the agent is liable to account to his principal, the trustee; but the trustee himself is the person who must be called on to account in this Court; and as I read the case of *Re Spencer's Estate*, 39

L. J. Ch. 841, to which we were referred by the counsel on each side, the same rule is enunciated, that a solicitor who acts as agent of a trustee in a transaction legally within his power, but which led to a breach of trust, was not to be held responsible as a constructive trustee, unless some of the property passed into his hands, or unless he was cognizant of a dishonest design on the part of the trustee. In that case it was alleged, as it is alleged here, that too much had been paid the solicitors for costs.

Barnes v. Addy, L. R. 9 Chy. 251, is also, in my opinion, an authority against such a bill lying in the present case.

The mere circumstance that the solicitor advised actions to be brought without the sanction of the Court, even if that advice were erroneous, would be no ground unless it were shewn to be part of a dishonest design on the part of the trustee and his solicitor thus to misappropriate a portion of the assets.

But if it be clear that the *cestuis que trusts* could not, by a suit in equity, obtain this relief, are they to obtain it on a summary application? If the appellant had been retained as a party defendant he could have resisted the taxation by obtaining the judgment of a Court of last resort. Is he to be made liable in this summary way where he has had no opportunity as a litigant to test the correctness of the taxation.

It may be questionable whether such a taxation could now be had at the instance of the beneficiaries of the estate. The effect of the decisions under a similar clause to our section 43 of the R. S. O. ch. 140, seems to reduce it to a very narrow operation, for as remarked in *Re Massey*, 34 Beav. 470, the cases concur in this: "That the *cestui que trust* can only tax the solicitor's bill as his clients, the trustees, could have done, and if they knowingly, and after having had due time to consider the bill, have thought proper to pay it, unless some of the items contained in it are fraudulent in the strict and criminal sense of that term the trustees are precluded from

taxing the bill, however improper it may be short of containing fraudulent items, in which case the *cestui que trust* is driven to his bill in equity to obtain relief."

We must assume now that no such case could have been made for ordering a taxation in the present case, and it is quite possible that a great injustice has been done under the forms of law to Mr. Haldan, the administrator, in disallowing the whole of the items in question, although he has himself or his legal adviser to blame for not testing the correctness of the Master's decision by appeal.

But as matters now stand, the beneficiaries under the will having themselves taken no steps to re-open that taxation where it is clear that they could not upon a bill have obtained any relief under the circumstances of this case against the solicitor, it would be an unprecedented proceeding to sustain the order complained of.

The case referred to *In re Campbell*, 32 U. C. R. 444, seems clearly to establish that that portion of the order which directs that the solicitor should be struck off the rolls is improper, but for the reasons which I have stated, the order for payment of a sum of money not shewn as against him to be in his hands otherwise than for costs properly incurred is also erroneous. It is impossible for us to say from the material before us whether the costs are reasonable or unreasonable, or incurred in actions properly or improperly brought, as they have been disallowed on the ground that they were brought without direct authority from the Court.

I have referred to the numerous authorities cited in the reasons against the appeal, some of which, if the references are correct, seem to have no application, and none of them conflict with the views I have above expressed.

Harris v. Rees, 16 W. R. 91, was a suit filed by the beneficiaries under a will against the trustees and their solicitors, and seems clearly to establish the doctrines laid down in the cases cited above, that a solicitor receiving trust moneys in the way any solicitor acting for the trustee may be said to act in the execution of the trusts when he

receives payment of his costs, cannot be made responsible to the *cestuis que trust* ; but they were held responsible upon the principle I have already referred to for a sum of money which came into their hands under the following circumstances.

"By the terms of a decree the trustee was ordered to get in and collect a specific sum of money, and to pay it into Court to the credit of a particular account, the effect of the decree being to earmark that particular portion of the personal estate, and to bind it by this order, and to make it no longer competent to the representative of the personal estate to expend it, or apply it in any way even for the proper administration of the estate, or to do otherwise with it than the decree directed. The solicitors who were fully aware of the terms of the decree received this money, and they applied a portion of it to the payment of costs incurred at some antecedent time, and it was held, the trustee having become insolvent, that the solicitors were *quasi* trustees of this fund."

The case referred to of *Re Cullen*, 27 Beav. 51, was one where a solicitor received money from his client to pay off a mortgage, but having so received it claimed a lien on it for costs, which was of course not allowed, and he was summarily ordered to pay the money within a fixed period.

The case of *Bulkely v. Wilford*, 2 Cl. & F. 177, is cited, I assume, for the position that if this attorney did not know, he ought to have known that he had no authority to bring a suit without the direct sanction of the Court. The language used there is this: "Whether you meant fraud, whether you knew that you were the heir-at-law of the testator or not, you, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property, for the benefit of the person who would have remained entitled to it if you had known what you ought as an attorney to have known. * * It is too dangerous to the interest of mankind that those who are bound to

advise, and who being bound to advise ought to be able to give sound and sufficient advice—it is too dangerous to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others.”

If my view of an administrator's powers be correct, it is an answer to this; but were it otherwise, it can scarcely be considered very much in point in the matter which we are considering, when it is quite possible that the consent, if applied for, would have been granted.

Ezart v. Lester, 5 Beav. 587, was an application to make a firm of solicitors responsible personally for a sum of money which was paid out of Court to the wrong person, and in which the Master of the Rolls says: “There is no doubt of the principle that if a solicitor, knowing that money which is in Court belongs to one person, presents a petition in the name of another and obtains payment, he is personally chargeable with the amount.” There could, of course, be no doubt that the solicitors would be parties to a gross fraud, and would be liable to be struck from the rolls. The case of *In re Martin*, 6 Beav. 337, is a case of a solicitor fraudulently abusing the confidence of his client. That in *Re Becke*, 18 Beav. 462, seems to confirm the view I have advanced, that there is no privity between these petitioners and the solicitor.

That was an application by the administratrix against her solicitor to pay over moneys collected for the estate, and some claim was made by the next of kin that he should not do so.

There can be no question, said the Master of the Rolls but that if the next of kin had taken proceedings against *Becke*, he might have protected himself by saying: “I am merely the solicitor of Mrs. Mercer, and am bound to pay over the money to her,” and on the other hand she would be liable for the money received by her agent and solicitor.

In re Chandler, 22 Beav. 253, was the case of a solicitor who was a trustee, and who induced his co-trustee to join in a breach of trust by the unauthorized sale of stock, the proceeds of which he applied to his own use.

In *Re Ward*, 31 Beav. 1, the solicitor was ordered to make good a loss which a defendant had sustained by reason of the recognizance ordered to be entered into by the receiver and his sureties not having been acknowledged by the receiver; but that case proceeded on the ground that a representation had been made to the Court, upon which it acted, that the recognizance had been duly entered into, and the Court compelled the solicitor to make good the undertaking or assertion on the faith of which it acted.

The case of *Bethell v. Abraham*, L. R. 17 Eq. 24, does not affect this case. There the Court had made a decree for the administration of the estate, and the powers of the trustees were subject to the control of the Court. Here there was no such state of things, but the administrator was appointed to fulfil the duties which would be exercisable by the executors if in the suit then pending the will had been held valid.

The case of *Thompson v. Milliken*, 13 Gr. 104, lays down a sensible rule which one can readily understand; that it is quite competent to the Master to disallow the whole of a solicitor's bill where the action was absurd and useless; but that is a very different matter from disallowing a bill because the authority of the Court was not previously obtained.

I see nothing in any of these cases to interfere with the view I have taken of this order, viz: that it was one which in the state of things existing when it was made, was unwarranted, and could not properly be made upon either petition, and that the appeal should be allowed with costs.

PATTERSON, J. A.—One of the petitions before us is that of the executors of Thomas Wilson, deceased. It is styled in an action of *Wilson v. Beatty*, which was brought by the widow of the testator against the executors and certain persons claiming under the will, and John Haldan who had been appointed by the Court of Chancery administrator, *pendente lite*, when another suit of *Wilson v. Wilson*, in

which a later will was declared invalid, was pending before that Court. After the final decision of *Wilson v. Wilson*, probate was granted of an earlier will, and the action of *Wilson v. Beatty* was brought to have the rights of all parties who took under that will declared, and for the administration of the estate.

In October, 1876, an order was made in the suit of *Wilson v. Wilson*, directing Haldan to pay into Court all moneys in his hands belonging to the estate, and to pass his accounts before the Master; and he did accordingly pay into Court the amount which appeared to be the balance in his hands after taking credit for four sums paid to Mr. Donovan, his solicitor, on account of costs of various suits and proceedings, amounting in all to \$2,350.

The object of this petition is to obtain an order to Mr. Donovan to pay into Court \$2,012.81, part of that sum of \$2,350.

It is shewn by the petition that the executors filed a bill against Haldan and Donovan to have the accounts re-opened, which Haldan had passed under the order in *Wilson v. Wilson*, that an order to that effect was made, and that the Master, upon the reference to him, reduced the amount properly paid to the solicitor to a sum less by \$2,012.81, than what had been before allowed. The petition, rather uncandidly, omits to state that by the judgment of this Court (*Beatty v. Haldan*, 4 A. R. 239) the bill had been dismissed as to Donovan, and that the decree and the reference were against Haldan alone, against whom, as it does allege, a *fi. fa.* issued for the sum of \$2,012.81, together with costs and interest, and was returned *nulla bona*.

The petition treats this sum of \$2,012.81 as trust funds in the hands of Donovan, and seeks by this proceeding to follow and recover the amount as improperly obtained, or, as put in one paragraph, fraudulently appropriated by the solicitor, with perfect knowledge at the time he received them that they were such trust moneys, and that Haldan was not in circumstances to enable him to make good the

same to the estate, and that no process against him would be effectual for the purpose of compelling payment. This last statement, it may be remarked in passing, is not very accurate, as coming from the executors. Haldan's sureties could make it more truly, but the executors had the sureties to resort to. The reduction is stated as to be accounted for by the disallowance in toto of certain of the bills of costs of Donovan, because the suits and business to which they related were of no advantage to the estate, and were unauthorized by the Court; and by other bills containing excessive and improper charges; and by errors made in the former taxation, by adding in place of deducting sums. A list of bills is set out, with figures professing to shew some details of the reductions; but I have not been able to derive much information from them, either here or as they appear again in one of the affidavits, beyond the general fact that of sixteen bills of costs seven were altogether disallowed, and nine considerably reduced. Allegations are made concerning the confidence placed by Haldan in Donovan, and charging abuse of that confidence in advising that the administrator could lawfully bring actions on account of the estate without first obtaining the sanction of the Court. This is the gravamen of the charge. In one paragraph it is formally set out, that the administrator consulted his solicitor, the said Joseph A. Donovan, as to whether it was necessary for him to obtain the sanction of the Court to bring suits on account of the estate, and was advised by him that it was not; and that the solicitor was well aware when he so advised the administrator that the administrator could not institute suits respecting the estate without the leave of the Court, except on his own responsibility; and that no costs connected therewith could be properly paid by him out of the assets of the estate without an order of Court, and yet the solicitor with this knowledge, and although his attention was specially called to the point, advised and carried on such suits without the sanction of the Court, intending to procure the payment of his costs thereof out of the estate.

In support of the contention that an administrator *pendente lite* ought to procure the direction of the Court, before bringing an action to enforce payment of a debt due to the estate, the statute under which Haldan was appointed, R. S. O. ch. 46, sec. 51, was relied on. That statute gives power to the Court, in which a suit is pending touching the validity of a will, to appoint an administrator of the personal estate, and declares that: "The administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court and act under its direction."

When the case of *Beatty v. Haldan* was before this Court, Chief Justice Moss, in delivering the judgment of the Court, holding that Haldan the administrator *pendente lite* was liable to be called on to account in that suit, in the exercise of the control of the Court, took occasion to illustrate the force and effect of the concluding words of the section, and referred to several English cases in which the same matter had been to some extent considered.

I refer to that judgment without repeating the remarks made, merely adding that the intention of one remark seems to have been misapprehended by the learned Judge in the Court below when he understood it to imply an opinion that it was the duty of the administrator to obtain the previous sanction of the Court to his bringing actions on behalf of the estate. The opinion expressed (4 A. R. p. 247) was, that there was no reason why any exemption should be extended to Haldan more than to other persons who had assumed a fiduciary capacity, and that both reason and authority shewed that a person invested with his powers, and exercising them independently of the previous sanction of the Court, is bound to account to the persons entitled to the property he has received, which Haldan had not done. This was introduced by the observation cited

by the learned Judge that the proceedings in which the costs complained of were incurred had not been sanctioned by the order of the Court, but had been taken by Mr. Haldan presumably in the belief that they were in the interest of the estate, but upon his own responsibility. It was not intended to suggest that an administrator *pendente lite* is required, like a receiver or the committee of a lunatic, to apply to the Court in every case for direction, and we have not been referred to any other authority from which such a suggestion can be gathered. We find nothing of the kind in *Williams* on Executors, where the office is treated of, and its duties, including the duty to collect the effects, are explained: *Williams* on Executors, 6th ed. pp. 474 *et. seq.* Nor in *Daniell's Practice*, where the office of receiver is treated of at pp. 1572, 1598, &c., of the 5th ed., and where the necessity for an order to bring actions on behalf of a lunatic is noted at pp. 82 and 264.

Applications such as that in *Bethell v. Abraham*, L. R., 17 Eq. 24, which was cited to us, and which was an application by trustees, after decree, in an administration suit, for the sanction of the Court to a proposed investment, stand on a different footing, and do not touch the question now in discussion; but the case suggests another illustration which may be useful to us. The direction of the Court, when it is required, is not required only when a suit is to be brought or defended, but when the trust funds are to be expended for any purpose, even in the payment of debts. "After a decree has been made," I quote from p. 1140 of *Daniell's Practice*, "the powers of the trustees are so far paralysed, that the authority of the Court must sanction every subsequent proceeding; thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing; a trustee for sale cannot sell; and an executor cannot pay debts, or deal with the assets for the purpose of investment." But, unless I mistake the law as stated both by counsel and the Court in

Tichborne v. Tichborne, L. R. 1 P. & D. 730, an administrator *pendente lite* appointed under the English statute, whose language is followed by ours, so far as the powers of the administrator are defined, may pay debts without leave of the Court, which is one particular in which his office is in that case contrasted with that of receiver. "The Court," said Lord Penzance, "has no power to order their debts to be paid, but it has power to appoint an administrator who can pay them." It will be borne in mind that Lord Penzance was acting under a statute which gave to the Probate Court, when the validity of a will was in contest in that Court, precisely the same power as our statute gives to any Court in which a similar contest is pending, which was the power under which Haldan was appointed. The language respecting the control and discretion of the Court is the same in both statutes; and no distinction arises upon the power of the Court of Chancery to deal with estates, because the estate in question before us was not being administered in Chancery when the appointment was made, or when the moneys in question were paid by the administrator, or received by the solicitor.

The disallowance of the seven bills of costs on the ground stated by the petitioners was, in my judgment, an error which arose from a misconstruction of the statute, and a consequent misapprehension of the powers and duty of the administrator *pendente lite*, which were erroneously assumed to be limited like those of a receiver; and there is nothing before us from which we can say to what extent the same misapprehension may have operated in the disallowance of the amounts deducted from the other nine bills.

I repeat that I am taking the facts to be as put in the petition. I should not have gathered from the Master's certificate that the so-called taxation had taken the course we are now told it took. The certificate is printed in the appeal book, with a note appended to it as follows:

" *In Chancery* :

" BETWEEN

" CHARLES BEATTY AND JAMES WILSON,
Plaintiffs,

AND

" JOHN HALDAN AND OTHERS,
Defendants.

" 29th June, 1880.

" I hereby certify that pursuant to the order* made in this cause and dated the 27th day of November, 1879, I have, in presence of the solicitors for all parties interested, taxed and moderated the bills of costs of Joseph Aloysius Donovan in the pleadings mentioned, and that the said bills of costs have been taxed and allowed at the sum of \$725.56.

" I further certify specially, at the request of the solicitors for the plaintiffs, that the said bills of costs were formerly taxed at the sum of \$2,738.37.

" T. W. TAYLOR."

* " Which is an order of the Court of Chancery making an order of the said Court the order of the Court of Appeal in the *suit of Beatty v. Haldan*, which latter order is partly as follows : That the said appeal, in so far as the said Joseph Aloysius Donovan is concerned, be and the same is hereby dismissed ; and that the bills of costs of the said Joseph Aloysius Donovan, in the pleadings mentioned, be referred to the Master of the Court of Chancery to tax and moderate."

This certificate seems to me calculated to mislead. When the Master certifies that he has taxed and allowed at \$725.56 the same bills which were formerly taxed at \$2,738.37, I should never infer that a large proportion of the bills had not been taxed at all, but that he had adjudicated concerning the right of the administrator or of his solicitor to be paid for the work done and moneys disbursed, and had disallowed the bills without taxation.

The style of the cause is misleading also.

The bill had been filed against Haldan, Donovan, and Mrs. Wilson. It had been dismissed by the plaintiffs as against Mrs. Wilson, and by the Court as against Donovan, and the order was therefore made in a cause against Haldan alone, and not against Haldan and others.

Primâ facie, Haldan's right was to be allowed, in his accounts, what he had paid his solicitor for the conduct of the business of the estate. The rule may be quoted from

Williams's Executors, at p. 1717, where it is said : "Again, if an executor pays an attorney for his trouble and attendance in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays. But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bond fide*, to the solicitor to the trust ; and the officer of the Court, without regularly taxing the bills, will moderate their amount." Haldan appears to have submitted to the decision of the Master without questioning, by way of appeal, either his authority to decide the question of his liability to his *cestuis que trustent*, or the soundness of the decision. But the solicitor urges that *he* cannot be bound by that decision which was made in a cause to which he was not a party, and was a decision from which he could not have appealed. I do not think any good answer has been given to this objection. The order in *Beatty v. Haldan*, which is not before us, but of which the note I have quoted professes to give an extract, when it directed a reference to the Master to tax and moderate the bills of costs, was necessarily an order affecting only the parties to the suit.

It applied in that suit the same rule of practice which was stated more than fifty years before by Sir John Leach, M. R., to have then long prevailed in the Master's office. This was said in the case of *Johnson v. Telford*, 3 Russ. 477, where executors and trustees had actually paid their solicitors in good faith the amount of their bills, and where it was ineffectually urged that this species of *quasi* taxation, if sanctioned at all, ought to be applied as against the solicitor, and not against the trustee.

That I correctly state the scope of the order in *Beatty v. Haldan*, as intended to affect the administrator only, is apparent from a slight reference to the language of Chief Justice Moss, at p. 249 of the report : " We now turn," he says, " to the case against the defendant Donovan. We think the bill cannot be sustained as against him. If Haldan has improperly paid him costs out of the assets of

the estate, the former is liable, and they must settle the matter between themselves. As between the plaintiffs and Donovan, there is no privity of any kind."

I make these remarks, of course assuming, for the purpose of the point in immediate discussion, nothing against the *bond fides* of either the administrator or the solicitor. I am dealing only with the effect of the Master's decision, which, I think, is *res inter alios acta*, so far as the legal position of the solicitor is concerned.

There is nothing in the view I take of what has been done which at all touches the question of the solicitor's liability to submit to a fair taxation of his bills. I retain the opinion expressed as the opinion of the Court in the judgment to which allusion has so often been made, that the first taxation cannot be so regarded. Mr. Donovan's suggestion that that opinion might have been modified if Haldan's cross-examination had been before the Court, overlooks the remark made by the Chief Justice that it was formed from the evidence of the solicitor himself.

I offer no opinion as to the proper way of proceeding to obtain such a taxation, or to try the questions in which the right to charge these costs may be involved, whether it should be by the ordinary application of the administrator, or of some one interested, in the name of the administrator, as in *Hazard v. Holland*, 3 Mer. 285, or by some more formal proceeding. I merely hold that no adjudication has as yet taken place on which the solicitor can properly be called upon to pay over, as part of the trust funds improperly in his hands, the moneys which he received from the administrator, or retained with the assent of the administrator, as payment of his costs. Confining myself to this conclusion I do not attempt to inquire into the merits of what is the real controversy, namely the relations between the administrator and his solicitor, and the right of the latter as between those two gentlemen, or as against the persons interested in the estate, to retain the money now in question.

That is a question on both sides of which there may be something to say, and its importance is sufficient to justify each party in requiring that it shall be tried in a proceeding which will leave him at liberty to test in appeal whatever decision may be given.

My conclusion as to the petition of the executors is, that it ought to have been dismissed.

The other petition is presented by Haldan, who is a co-defendant with the executors in the action of *Wilson v. Beatty et al.*, in which the petition is styled. It relies upon the same assumption, that the law required the administrator to obtain the direction of the Court before bringing any action, and upon the asserted fraudulent conduct of the solicitor in advising his client that there was no such rule of law. Some other grounds are added, and amongst them there is an allegation which, if it were true, might give some colour to the contention of the petitioner. It is alleged that when Donovan received the moneys, as well as when the administrator's accounts were passed, the estate was being administered by the Court. If this were the fact the same necessity for resorting to the Court would probably have existed as in *Bethell v. Abraham*. But it was not the fact. The moneys are shewn, by dates given either in the petition or elsewhere among the documents, to have been received in 1875 and 1876, while the administrator's suit was not instituted till 1877. This petition, like the other one, sets out the action of Beatty against Haldan and Donovan and the order of 27th November, 1879, for what is called the re-taxation, and it exhibits the same want of candour in keeping out of view the dismissal of that action as against Donovan, and the important fact that the order was made in a suit to which he was not a party.

It is not necessary to inquire whether Haldan, who had been the administrator of the estate, may or may not, as the immediate client of Donovan, have remedies which are not open to the executors or those interested in the estate because the right which he now asserts is the same as that

put forward by the executors, namely the right to claim from the solicitor repayment of moneys paid him on account of business done on behalf of the estate, because those payments have been disallowed as between the administrator and the estate. The answer to this claim, as to the other, is that they were not disallowed by any judgment which is binding upon the solicitor, and that the judgment relied upon is one which proceeded upon an erroneous interpretation of the law.

I think this petition must share the fate of the other, and that we should allow the appeals, with costs, and dismiss both petitions, with costs.

HAGARTY, C. J., concurred.

BAILEY V. JELLETT ET AL.

Trustee and cestui que trust—Solicitor and client—Deposit of client's money to credit of solicitor—Appropriation of payments—Bankers.

The plaintiff placed in the hands of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a Loan Company, and which it was arranged, between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the Loan Company, amounting with interest to \$8,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favor of the plaintiff, and transmitted the same to the plaintiff on the 26th of August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th of September following:

Held, that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof.

After the deposit of the plaintiff's money J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum.

Held, that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S.; but [in this reversing the judgment of the Court below] as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand.

The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or maturing after notice to the bank of J.'s death.

Held, that they could not do so, and in consequence of having made such claim both in this Court and the Court below, they were refused their costs.

THIS was an appeal by the defendant Fanny Suzor and another appeal by the Canadian Bank of Commerce, from the judgment of Proudfoot, J., pronounced at the trial of the action, whereby he adjudged that the plaintiff was entitled to certain moneys deposited with the defendants, the bank, by one Morgan Jellett, in priority to the defendant Suzor and that she was only entitled to rank upon the estate of Jellett for the amount of her claim.

The appeals were distinct, but the facts were the same in each.

The leading facts were, that Morgan Jellett, who died on the 4th day of September, 1881, intestate, was, during his lifetime, and at the time of his death, the solicitor and confidential adviser of the plaintiff.

That on or about the 9th of June, 1881, the plaintiff entrusted the deceased with a mortgage, made by one Sarah Jane Russell to the plaintiff, for securing \$6,000 and interest, and a discharge of that mortgage, duly executed by the plaintiff, for the purpose of receiving the amount due thereon, depositing the same in the Savings Department of the said Canadian Bank of Commerce at Belleville, and taking a deposit receipt therefor in the name of the plaintiff.

That on the 15th day of August, 1881, Jellett received the sum of \$6,455.40 in payment of the mortgage; and he, in breach of his duty, deposited the same on that day to his own credit with the defendants the Canadian Bank of Commerce; and on the 26th of that month chequed out \$3,000, and deposited the same in the Savings Department of the bank to the credit of the plaintiff, and took a deposit receipt therefor in the name of the plaintiff, and transmitted the same to the plaintiff.

That the plaintiff was not aware that Jellett had been paid the full amount of the mortgage, but on the contrary had been induced to believe that \$3,000 only had been paid, and the plaintiff never authorized Jellett to deposit the said \$6,455.40, or any part thereof to his own credit, and his so doing was a breach of trust, and in violation of his duty to the plaintiff; and at the time of the death of Jellett there was standing to his credit in said bank a sum nearly sufficient to cover the \$3,455.40 balance of said trust moneys.

That the plaintiff did not know until after the death of Jellett that he had been paid the sum of \$6,455.40, and had deposited the same to his credit; and the plaintiff, on the 5th day of September, 1881, notified the bank not to pay out the said \$6,455.40, or any part thereof, without the consent of the plaintiff, and claiming the moneys then lying to the credit of Jellett as moneys of the plaintiff.

That after the death of Jellett, who had been solicitor for the bank, the bank appropriated a certain portion of the moneys so lying to his credit to the payment of cer-

tain notes and cheques made by Jellett; and the plaintiff claimed to be entitled to be paid his demand in priority to the payment of the said cheques and notes, and that if there were a deficiency of other moneys, the bank might be ordered to pay such deficiency to the extent of the moneys so appropriated by them.

The defendant Fanny Suzor set up that she knew nothing of the transactions between Jellett and the plaintiff, and she had instructed Jellett, as her solicitor, to collect certain moneys due to her by the estate of one McAnnany, and Jellett was, on or about the 23rd day of August, 1881, paid the sum of \$1,182.95, as her solicitor, which moneys Jellett, on the 24th of August, deposited in the said Bank of Commerce, at Belleville, to his own credit.

That Morgan Jellett wrote to her, stating that he had collected the said moneys, and asking for instructions as to what she wished done with the same; and in or about eleven days afterwards Jellett died.

From the time of such deposit, and up to and at the time of the death of Jellett, there was lying to his credit in the said bank a larger amount than that collected as above mentioned for her; and after the death of Jellett the bank appropriated a certain portion of the moneys so lying to the credit of Jellett, to the payment of certain notes and cheques made by him.

And the defendant Suzor claimed that she was entitled to be paid the sum of \$1,173.95, and interest thereon, and her costs of suit, out of the moneys lying to the credit of Jellett at the time of his death, in priority to the plaintiff's claim; and also, that she was entitled to be paid her claim in priority to the payment of the said cheques and notes; and if there should be a deficiency of other moneys, that the bank might be ordered to pay such deficiency, to the extent of the moneys appropriated by them to the payment of such cheques and notes.

The defendant Sarah M. Jellett had obtained letters of administration to the estate of her deceased husband.

Under these circumstances the plaintiff claimed that he

was entitled to follow into the hands of the bank and be paid the said sum of \$6,455.40, and interest thereon, less the sum of \$3,000 paid to the plaintiff, and to an injunction restraining the bank from paying out the said sum of \$3,455.40 and interest to said Sarah M. Jellett, or any other person or persons other than the plaintiff; and also to have the real and personal estate of Jellett administered in Court, and for that purpose to have all proper directions given and accounts taken; and to have a receiver appointed of the rents of his real estate.

The action came on for trial at Belleville on 1st of May, 1882.

Moss, Q. C., and Clute, for the plaintiff.

H. J. Scott, for the defendant Suzor.

S. H. Blake, Q. C., for the Bank of Commerce.

Northrup, for Mrs. Jellett and her infant children.

June 14th, 1882. **PROUDFOOT, J.**—This action is brought against the executrix of Morgan Jellett, the Canadian Bank of Commerce, and Fanny Suzor.

Morgan Jellett, the testator, was a solicitor, and died 4th September, 1881.

Jellett had been for many years the solicitor of the plaintiff, and had invested a sum of money for him on a mortgage made by one S. J. Russell. Russell afterwards employed Jellett to obtain a loan from a building society for the purpose of paying the plaintiff's mortgage. Pending the completion of this transaction, Jellett obtained from the plaintiff the Russell mortgage and a discharge of it, in order to be able to give them up to Russell on payment of the money. Some delay having occurred in completing the title, the plaintiff pressed for a return of the mortgage and discharge, when, on the 30th July, 1881, Jellett wrote to him that matters were being pushed as fast as possible, and if he were to return the mortgage and release it would cause much delay, and agreeing to hold himself responsible for the money.

The money was at last obtained on the 15th August, and was deposited to Jellett's account in the Canadian Bank of Commerce. The circumstances connected with the deposit I take from the evidence of the plaintiff.

Thomson says that Jellett, who was solicitor of the bank, told him the plaintiff was about receiving this money, and Jellett was desirous of having him deposit it in the bank, and for that purpose took Thomson

to see the plaintiff so as to make this more certain. They saw the plaintiff; he was quite satisfied to have it deposited with them; it was not said how, but Thomson's idea was that it was to be on a deposit receipt, as had been usual when plaintiff deposited money with them before. Plaintiff says he saw Jellett and Thomson, and was pleased the money should be deposited with the bank. "A receipt was to be sent to me from the bank for the money. Thomson said when he got the money for me he would hold it for me." And Mr. Williams, solicitor for plaintiff, saw Thomson on the 5th September, who said he recollected the deposit by Jellett of \$6,500, and his afterwards getting the defendants' receipt for \$3,000 for the plaintiff, and that he thought it strange the whole amount was not sent.

On the 23rd August the plaintiff wrote to Jellett complaining that he had not sent him the receipt which he had promised to send before that. On the 25th Jellett replied, enclosing a receipt for \$3,000, and saying the balance would be sent next week.

I think this establishes a fiduciary relation between Bailey and Jellett, and that Jellett received the money on a special trust to deposit it in the Bank of Commerce, and send a deposit receipt for the amount, and that of this special trust the manager of the bank had at least notice—though perhaps the evidence might justify ascribing to him an express fiduciary relation to the plaintiff, undertaking to receive and to hold the money for him: see cases 2 Can. L. T. 217. The amount deposited on the 15th of August by Jellett was \$6,500.40, of which \$45 was for his costs in the matter of the Russell loan. Two cheques were given by the Hastings Loan and Investment Co., one for the proceeds of the Russell loan, and the other for the costs, and expressed on their face what they were for. The difference between these two sums, or \$6,455.40, was treated by counsel on both sides as the amount due to the plaintiff. But if there is any dispute as to the precise sum, the calculation may be made by the registrar. I have no doubt from the manner in which the deposit was obtained, and the other circumstances, that the manager of the bank was aware of the exact sum due to the plaintiff.

The result then is, that Jellett's estate and the bank are both liable to the plaintiff for the amount due to him.

The claim of Mrs. Suzor stands in a different position. The money was not received on any special trust by Jellett. It was the ordinary case of a solicitor collecting money for a client and depositing it in his own name in the bank. The bank may have known the source whence the money was derived, but I do not think they are therefore bound to inquire into the authority of the solicitor who made the deposit. It would be imposing a very onerous duty, and not I think sanctioned by any of the cases, to require them to be assured of the authority of every depositor to draw checks on the money deposited by him.

But I think that both Mrs. Suzor and the executrix have a right to com-

plain of the payments made by the bank and the notes charged to Jellett's account after his death. The manager knew of Jellett's death a few minutes after it occurred, and their payments and charges cannot be maintained on the ground of ignorance of the death. The amount due to Mrs. Suzor, and deposited by Jellett, is easily identified, for it was paid by a check to Jellett's order on the same bank, specifying that it was for the debt and interest due to Mrs. Suzor. But that is of no importance, since I find that the money due to the plaintiff was due on a special trust, and that the money due to Mrs. Suzor was not affected by any such trust, or at all events that the bank had no notice of any trust, and was not bound to inquire as to the authority of Jellett to draw upon the money deposited by him.

At the date of Jellett's death there were \$2,991.45 to his credit in the bank, and the amount due to the plaintiff that had to be made good was, I think, \$3,216.95. This exhausted all the credit and \$225.50. The sums paid by the bank after Jellett's death amount to

\$1342.04

and for that sum and the 225.50 they must prove on the estate.

\$1567.54

Mrs. Suzor's only remedy would seem to be against the Jellett estate. In treating of her claim, I assume that the steps necessary to entitle her to relief against the co-defendants have been taken (Rule 164) as the case was argued on behalf of all parties.

The plaintiff to have his costs against the Jellett estate and the bank. Mrs. Suzor to have her's against the estate.

I do not think the plaintiff was bound to come in under the administration decree.

The appeal came on to be argued before this Court on the 13th December, 1883.*

H. J. Scott, Q.C., for the appellant Suzor. The evidence clearly establishes that the moneys of this appellant were deposited in the bank on the 24th August, 1881, and were never withdrawn, and were lying to the credit of Jellett at the time of his death—that the moneys were in fact earmarked; and she is now entitled to recover them. As between the plaintiff and the defendant Suzor, the rule in *Clayton's Case* applies, and all moneys drawn out by Jellett subsequent to the deposit of Mrs. Suzor's moneys, must be taken to have been drawn out of the plaintiff's moneys in

(*) *Present.*—SPRAGGE, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

the absence of evidence to the contrary. No money, as a matter of fact, was drawn out by Jellett subsequent to the deposit of Mrs. Suzor's money, with the exception of \$93, and \$3,000 paid to the plaintiff; and the conduct of Jellett evidences that he intended to keep Mrs. Suzor's money intact. Besides, even if the finding of the Judge below were correct, that the plaintiff's money was received upon a special trust, and that the bank had notice of the trust, and is therefore liable to repay the money in full, the bank cannot take Mrs. Suzor's money for the purpose of replacing the money lost by the joint breach of trust of Jellett and themselves, which had taken place prior to the deposit of Mrs. Suzor's money: *Ex parte Cooke*, 4 Ch. D. 123; *Re Hallett's Estate, Knatchbull v. Hallett*, 13 Ch. D. 696.

S. H. Blake, Q. C., and Crickmore, for the Bank of Commerce. In no view can the bank be treated as trustees for the plaintiff, nor did any fiduciary relation exist between them and the plaintiff, nor between them and Jellett, in respect of the amount, or any part of it, claimed by the plaintiff in this action. The account of Jellett with the bank was kept in the ordinary and usual way of accounts in banks with their customers; and the several payments into, and drawings out, of the said account by Jellett are shewn therein, and the bank had no knowledge or notice save what appears by the account itself and the books of the bank from which it is copied. If the moneys of the plaintiff claimed in this action were received by Jellett upon any special trust, he did not at the time of paying them into the bank inform the bank thereof, but simply deposited the moneys to his own private account at the times they appear by the account to have been deposited; and the moneys appearing by the account to have been paid in by Jellett as his own moneys, the bank was bound to honor and pay the cheques drawn by Jellett upon the fund in the usual course of business; and no ground is shewn for making the bank liable for the dealings of Jellett with the moneys of

his client. The conversations between the plaintiff and the agent or cashier of the bank at Belleville, who had no power or authority to act as trustee or render the bank liable beyond what they would be liable for in the ordinary course of business as bankers, are insufficient to render the bank liable to the plaintiff, as trustees or otherwise; the same, not having been followed up by obtaining from the bank a deposit receipt. No bank could possibly attempt to carry on business if they are to be fixed with notice of trusts, even in cases where the moneys may be deposited by a trustee as such. As between the bank and the plaintiff and the defendant Suzor, it ought to be held that, with reference to the bank account of Jellett, the earlier drawings should be applied to the earlier payments into that account, he (Jellett) not having specially appropriated his drawings to any account: *Foley v. Hill*, 2 H. L. C. 36; *Brown v. Adams*, L. R. 4 Ch. 764; *Clayton's Case*, 1 Mer. 572; *Pennell v. Deffell*, 4 D. M. & G. 372.

Moss, Q. C., and *Clute*, for the respondent (Bailey), contended that the money for Bailey was received by Jellett upon a special trust, of which the bank, through their agent, had notice, and the bank received the same from Jellett stamped with such trust, and in pursuance of a distinct understanding with the plaintiff to receive the same for the plaintiff; whereas the claim of Mrs. Suzor was not received by Jellett or the bank on any special trust. In such a case the rule in *Clayton's Case* did not apply, and in any event the plaintiff was entitled to be paid the full amount of his claim as against the bank, and this right was in no way affected by the claim of Mrs. Suzor. It was proved in the cause that Jellett received the plaintiff's money on a special trust, to deposit in the bank for the plaintiff and send him a deposit receipt for the same, and the manager of the bank had actual notice of this being the intention of plaintiff. Under these circumstances the bank was not only affected by notice of the trust, but expressly assumed the same, and undertook to receive

and to hold the money for the plaintiff. Jellett received and held the plaintiff's money as a trustee or in a fiduciary character, and paid it into his account at his bankers, and mixed it with his own money, and afterwards paid in and drew out sums by cheques in the ordinary manner; and the plaintiff submitted that the rule in *Clayton's Case*, attributing the first drawings out to the first payments in, did not apply, and that Jellett must be taken to have drawn out his own money in preference to the trust money: *Ne Zealand and Australian Land Co. v. Watson*, 7 Q. B. 1374; *Ex parte Cooke in Re Strachan*, 4 Ch. D. 123; *Hallett's Estate—Knatchbull Hallett*, 13 Ch. D. 695.

Northrup, for Mrs. Jellett and her infant children.

January 10, 1884. SPRAGGE, C.J.O.—At the close of the argument the inclination of my opinion was that the judgment was right as to the claim of defendant Suzor as between her and the plaintiff, *i. e.* as to her being a *cestui que trust* in Jellett. Jellett, as her solicitor, had collected moneys for her. As to those moneys he was her debtor, and an action would lie for money had and received. The question was whether she had any further remedy.

As to the claim of the plaintiff against the bank:

A Mrs. Russell was about to pay off a mortgage for \$6,000; the plaintiff being the holder of that mortgage and Russell borrowing from the Hastings Loan and Investment Company the money for the payment of the mortgage. This she did through Jellett, and Jellett—who had been the plaintiff's solicitor for a number of years, having acted for him, *inter alia*, in the investment of his money on the mortgage by Russell to him—had placed in his hands by the plaintiff the Russell mortgage, and a discharge of it by plaintiff, in order to the delivery of the same to Russell upon the money being paid in discharge of his mortgage. The money was to be received by Jellett for plaintiff.

This was before July 6th. On that day the plaintiff

wrote to Jellett a letter, directing him to retain his money till he came down to see him (a).

The first date of the bank being brought into the matter, or having any knowledge of it was late in July or early in August. This was brought about by Jellett, who got the local manager, Mr. Thomson, to see the plaintiff, an aged man of 92. Jellett wished that the money should be deposited in the bank, and suggested it to plaintiff, who made no objection. Thomson gave no undertaking in regard to it. It does not appear that he made any request about it. He merely accompanied Jellett. Plaintiff had previously deposited money, and taken deposit receipts; and Thomson assumed or supposed that the same thing was intended in this case. It was not supposed that the deposit was to be a permanent investment. The money reached the bank on the 15th August by cheque of the loan company, payable to Jellett or order. On the 6th of August Russell had given an order upon the loan company to pay the money to Jellett. Jellett paid the money into his own credit at the bank, and the whole so remained until the 26th, when Jellett gave an order on the bank to pay \$3,000 to deposit receipt of the plaintiff. The question is as to the difference.

How and when would the bank necessarily see that there was a breach of trust. If there was any, it consisted in Jellett paying in the money to his own credit at the bank, instead of placing it upon deposit to the credit of the plaintiff. To bring home any notice to the bank, we must go back some six weeks to the interview between Jellett, the plaintiff and the bank manager. The presence of the manager appears to have been brought about by

(a) The letter was as follows:

"HAROLD, July 6, 1881.

' *Morgan Jellett, Esq.:*

"SIR—You will be pleased to hold on to my money till I come down myself and see you myself. See to it.

Yours, &c.,

JAMES BAILEY, SEN.

Jellett, with a view, possibly for his own purposes, of the money being placed in the bank, and not elsewhere.

The manager would not necessarily know anything more than that a certain sum of money due upon a mortgage held by the plaintiff was expected to be paid shortly ; and that it was the then intention of the plaintiff that it should be paid into his bank ; and he expected that it would be placed to his credit. Some six weeks after this the cheque of the loan company was brought to the bank, and being payable to Jellett, it would be in the ordinary course of business, and was in fact placed to his credit.

The question is, whether the manager would necessarily see in this a breach of trust on the part of Jellett ? As a matter of fact he did not see it, nor did he, so far as it appears, think it strange. What he did think strange was, that the direction to deposit given eleven days afterwards was for \$3,000 only, not for the whole.

I do not see that the manager would necessarily see in the paying in of this \$6,500 a breach of trust. The plaintiff lived in the township of Rawdon ; was about 90 years of age, and was an illiterate man, not able to write. If an early investment of this money were on the *tapis*, a temporary placing of the money to the credit of the solicitor would facilitate such investment. Jellett had been his man of business for twenty-six years ; he had invested his money in the mortgage by Russell, and the plaintiff had never even seen that mortgage. Was it, under these circumstances, a necessary, or even a proper inference for the manager to draw, that Jellett intended a misappropriation of that money, or that he had not authority to pay it in as he did ? He had the plaintiff's authority to receive it ; he might not unreasonably assume, that in the six weeks' interval there might be a change of intention, if it can be called a change of intention, as to its being placed immediately on deposit receipt.

We may fairly look at the position of the manager. Assuming for the moment that he was personally cognizant of the paying in of this money, could he reasonably

be expected to say to Jellett, or to Jellett's messenger, when the cheque was brought to the bank, "I cannot receive this money, because, when I saw you and Mr. Bailey six weeks ago, the money coming from Russell was to be placed on deposit to his credit, and you are committing a breach of trust?" And I may observe here, that the gist of what passed on that previous occasion was, where, at what bank, the money was to be paid in, whether the Bank of Montreal or the Bank of Commerce; not whether it was to be paid to the credit of Bailey himself or to the credit of his solicitor.

To hold banks liable under such circumstances would enlarge their responsibilities to an unreasonable extent; and it would become necessary for the safety of the banks that their local agents and their receiving tellers should have a legal as well as a commercial training. The result is, that as to this item the bank, in my judgment, is not liable.

A further consideration of the position of Mrs. Suzor has brought me to the conclusion that she is entitled to her remedy, not only by action for money had and received, but to a charge upon the fund in the hands of the bank. There can be no doubt that a fiduciary relation exists between an attorney and his client. The very term "attorney" imports this; and Mr. Pulling, in his useful book on the law relating to attorneys (3rd ed. p. 3), says: "The term attorney seems, in its widest sense, to signify any substitute or agent appointed to act in the turn, place, or stead of another, including as well a general authority to act, see to, and take upon him the charge of the business of others * * * or as attorneys at law *ad lucrandum vel perdendum*, for the plaintiff or defendant in an action or suit."

In *Ex parte Dale*, 11 Ch. D. 772, a banking company were employed as agents to collect certain moneys for their employers; and when collected, to remit them to their employers. Mr. Jellett was employed by Mrs. Suzor to perform the same duty, viz.: to collect a sum of money

due to her from the estate of a Mr. McAnnany, and to remit it when collected to herself. In *Ex parte Dale* the bankers received the money, and before remitting it went into liquidation. Mr. Jellett received the money he was employed to collect, and did not remit it, but placed it to his own credit at his banker's. The cases are parallel. Mr. Jellett could not be less an agent, or his position less a fiduciary one, by reason of his being an attorney practising in the Courts, than were the bankers who were employed to collect moneys in *Ex parte Dale*. In that case Mr. Justice Fry, in deference, as he conceived, to decided cases, and not in accordance with his own individual opinion, held that the employers of the bank, in relation to the moneys in question, could not follow the moneys paid in; that they were part of the general assets of the bank.

That case came very distinctly under the review of the Court of Appeal in *Re Hallett's Estate—Knatchbull v. Hallett*, 13 Ch. D. 696-705, and was overruled. In *Hallett's Case* a Mrs. Cotterill had deposited some foreign securities with Hallett, who was her solicitor; and he improperly placed them in the hands of his bankers to sell them. They were sold, and the proceeds placed by the bankers to Hallett's credit; and it was held that Hallett stood in a fiduciary relation to Mrs. Cotterill. Upon that point Lord Justice Thesiger does not appear to have differed from the other members of the Court. The point upon which he differed was, as to the right of Mrs. Cotterill to follow the proceeds of the sale into the hands of the bankers; and as to that he, like Mr. Justice Fry, deferred to the authority of decided cases. He commences his judgment by saying: "I feel myself bound by authority to affirm the judgment of Mr. Justice Fry. Upon principle, there is great strength in the argument for the appellants."

Upon the first question, that of fiduciary relation, the late Master of the Rolls, Sir George Jessel, asks: "Has it ever been suggested until very recently, that there is any distinction between an express trustee, or an agent, or a

bailee, or a collector of rents, or anybody else in a fiduciary position? I have never heard, until quite recently, such a distinction suggested. It cannot, as far as I am aware (and since this Court sat last to hear this case, I have taken the trouble to look for authority), be found in any reported case even suggested, except in the recent decision of Mr. Justice Fry, to which I shall draw attention presently. It can have no foundation in principle, because the beneficial ownership is the same, wherever the legal ownership may be. * * * I say on principle it is impossible to imagine there can be any difference. In practice we know there is no difference; because the moment you get into a Court of Equity, where a principal can sue an agent, as well as a *cestui que trust* can sue a trustee, no such distinction was ever suggested, so far as I am aware."

If Mr. Jellett drew out of the bank a portion of the trust moneys of Mrs. Suzor that he paid in, his doing so would at any rate be improper if, and as far as, his cheques upon the bank could be attributed to those moneys. It would not, however, make any difference whether what he did in that respect was proper or improper. Upon that the Master of the Rolls observed (p. 709): "There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds." He does, however, in another passage refer to what he treats as improper conduct in the drawing out of moneys from a bank viz.—where a man has paid in the moneys of others to the same account as his own, his drawing against the account, so as to reduce the amount to a smaller sum than the amount of the trust moneys (p. 730). And that would unquestionably be improper conduct.

In *Ex parte Hallett* the question was, whether the rule in *Clayton's Case* applied, and it was held that it did not: that in short, where there were moneys, a portion of which only belonged to the person in whose name they stood at the bank, and a portion to some other person standing in a fiduciary relation to the person in whose name the mon-

eys stood at the bank, the latter, in drawing against his account at the bank, must be taken to have been drawing out moneys which he had a right to draw out, not moneys which he could not properly draw out; that he could not be heard to say that he was drawing out moneys to which he was not entitled. And this certainly does appear very intelligible, as well as manifestly sound in principle. Sir George Jessel illustrates the principles upon which his decision is based, by reasoning and by analogies which appear to me irrefragable.

It is not, as it appears to me, necessary to determine whether the rule in *Clayton's Case* should apply as between *cestuis que trust* of the same fund (except, perhaps, as to a small sum which I will notice presently), because we can in this case trace and follow the moneys of Mrs. Suzor at the bank, as well as what may have remained of the moneys of the plaintiff. Before the payment in of Mrs. Suzor's money there stood to Jellett's credit \$4,901 that being \$1,599 (not counting cents) less than the moneys of the plaintiff, the difference it is to be assumed having been used by Jellett himself. If Jellett had died at that time, and Mrs. Suzor's money had not been paid in, the plaintiff would have been entitled to that sum, \$4,901. What occurred after the date that I have named was this: Mrs. Suzor's money, \$1,182.95, was paid in, and no other sum; and there were paid out four cheques, amounting together to \$93: and \$3,000 was drawn out and placed to the plaintiff's credit, leaving at Jellett's credit, at the date of his death, \$2,991. That sum was composed of the \$1,182, belonging to Mrs. Suzor, which is as distinctly traceable as it would have been if it had been the only entry on the face of the account after the paying in of that money. It is in fact the only entry on that side of the account.

The only possible question could be as to the cheques amounting to \$93, and as to them it may be necessary to resort to the rule in *Clayton's Case* as a convenient rule, where some rule is necessary.

There is indeed room for the presumption that Jellett

drew those cheques intending not to touch Mrs. Suzor's money, for he had drawn against the plaintiff's money before her money was paid in ; and when he did make a payment to the plaintiff he left unpaid a considerable sum which he might have paid, still leaving Mrs. Suzor's money intact.

Upon that branch of the case my conclusion, therefore, is that Mrs. Suzor's claim is to be preferred.

I agree with my brother Burton, that the bank was not warranted, after notice of Jellett's death, in charging against the funds in its hands either the cheques or the notes.

I agree with him also as to what will be a proper direction in regard to the costs.

BURTON, J. A.—I agree with the learned Chief Justice that there is no evidence upon which we could hold the bank liable as trustees for the plaintiff in respect of the amount claimed or any part of it.

I feel at a loss to understand upon what principle it is attempted to fasten a trust upon the bank. Assuming the bank manager to have had the clearest notice that Jellett was on receipt of the money to procure a deposit receipt in the plaintiff's name from him as manager of the bank, he had no control over Mr. Jellett, and even if he had undertaken with the plaintiff to be responsible for Jellett's actions, and I must confess that it would require very clear evidence to convince me that any bank manager would enter into such an engagement, such engagement would be *ultra vires* as bank manager, and would not bind the bank ; but it is manifest upon the evidence, that all that was in the minds of the parties at the time of the conversation between the plaintiff, Jellett, and the bank manager, was, that the Bank of Commerce was the bank selected, that the bank manager agreed to accept the deposit, and that the plaintiff trusted to Jellett to carry out his instructions. All that the bank manager undertook to do was, if the money was deposited with him he would receive it and

grant the usual deposit receipt for it, an undertaking he was at all times willing to carry out, although I apprehend that if for any reasons the bank had in the interval deemed it desirable not to receive money on deposit it would have been competent to them to decline without rendering themselves liable in any way to the plaintiff. Their liability would commence with the issue of the deposit receipt.

As respects the claims of the appellant Mrs. Suzor and the plaintiff, it will be more convenient to consider them in the order in which they were respectively argued before us.

The facts as regards Mrs. Suzor's claim appear to be that the late Mr. Morgan Jellett, as her solicitor, about the 23rd August, 1881, that is about twelve days before his death, collected, on her behalf, a sum of \$1,182.95, which sum of money he deposited on the following day in the Bank of Commerce *to his own credit*, a course which would have rendered him liable to his client in the event of the bank's failure.

Now, if Mr. Jellett had, on receipt of this money, placed it in an envelope and indorsed upon it a memorandum of its being the money collected for Mrs. Suzor in the particular case, or if he had taken a deposit receipt for the amount in his own name, no one would for a moment suppose that that money would form part of the assets of his estate. Can it make any difference that he has deposited it with his banker so long as it can be clearly established that that sum still remains in the bank, though mixed with other moneys deposited by the deceased.

The principle governing such cases, if the case of an attorney collecting money can be brought within it, is well stated by the late Lord Justice Thesiger, thus: "Wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody, or for the purpose of being disposed of for the benefit of the person intrusting the chattel, then either the chattel itself or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any

time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material." *Re Hallett's Estate*, 13 Ch. D. 723.

The learned Judge below seemed to consider that the parties occupied the relative positions of creditor and debtor and nothing more, and if this view could be sustained I should consider his decision right, but I am unable to come to that conclusion. The moneys received by Mr. Jellett in this case were so soon as received the moneys of Mrs. Suzor; it was his duty to preserve those moneys for her separate and apart from other moneys, and if he paid them, as it was reasonable he should do, into a bank, it would have been proper to pay them into a special account, not necessarily perhaps to her credit; but to some special account, as to a clients' account.

I see no solid distinction between this case and *Birt v. Burt*, 11 Ch. D. 772, in note, where it was held that, as Burt had acted in the capacity of agent for the trustees in the sale of Lord Southampton's estate, it was his duty to pay the money he received to the account of the trustees, instead of which he had paid it into his own banking account. And it was held in an administration suit that the trustees had a right to follow the money, and to have it paid out to them; and on appeal, the late Master of the Rolls, the present Lord Chief Justice of England, and Baggally, L. J., considered the case too clear for argument.

The money of Mrs. Suzor, in the present case, was paid into the bank, and remained there till the time of his death.

It was said that the \$3,000 sent to the plaintiff were paid out subsequently; but it surely is not to be presumed that Mr. Jellett, having then a sum of money to his credit belonging to the plaintiff, exceeding the sum of \$3,000, intended to commit a crime by taking Mrs. Suzor's money for the purpose of making that payment. The answer to such an argument may be given to Mr. Jellett's representative, as might have been given to him if he, when living, had alleged such a reason: *Allegans suam turpitudinem non est audiendus*."

I think, therefore, that as Mr. Jellett did owe to Mrs. Suzor a duty in reference to the moneys he received beyond the ordinary duty of a man to pay his debts; and inasmuch as the moneys lying in the bank were clearly to the extent of \$1,182.95 the claimant's money, she was entitled to follow it: that in that respect the learned Judge's finding cannot be supported, and the decree should be varied by declaring her so entitled.

Then as to the claim preferred by the plaintiff. This money was received in the same way as Mrs. Suzor's, by the attorney in his professional capacity, and upon the understanding that he should deposit it to the plaintiff's credit, and forward to him a deposit receipt, instead of which he placed it in the bank to his own credit. The same reasons which apply to Mrs. Suzor's case apply to this, if we are enabled to trace the money or to the extent to which it can be traced.

Now, the facts appear to be these:

On the 15th August the solicitor deposited the money he had received on account of the plaintiff, \$6,455.40, and moneys of his own, \$45, together amounting to \$6,500.40, to his own credit in the Bank of Commerce. His account, previously to this deposit, was overdrawn to the extent of \$151.56.

Between that date and the date of his death he deposited (in addition to Mrs. Suzor's money) various sums amounting to \$1,380.20, presumably his own money. No evidence, at all events, has been given that they are claimed by any one else. And he drew against the account (in addition to the \$3,000 remitted to the plaintiff by bank deposit receipt), \$2,875.54. In other words, he improperly applied to his own use \$1,495.34 of the plaintiff's money, in addition to his over-drawn account of \$151.56. So that the state of the funds at his death stood thus:

Balance in Bank.....	\$2991 45
Of which Mrs. Suzor was entitled to	
draw.....	\$1182 95
Leaving still remaining of the plain-	
tiff's money.....	1808 50 \$2991 45

I think it perfectly clear that after notice of the death the bank were not warranted in charging against the fund either the cheques or the notes.

My conclusion therefore is, that on Mrs. Suzor's appeal, the appeal must be allowed, and a decree made in her favor, declaring that she is entitled to follow the money, and to a first charge on the money in the hands of the bank to the extent of her claim, \$1,182.95.

And as the plaintiff has resisted her claim, it would be proper, I think, that she should be entitled to her costs against the plaintiff, with liberty to him to add them to his own costs, and recover them from the estate; and that the plaintiff should be entitled to the residue of the moneys, and entitled to recover the deficiency against the estate of Jellett with costs, and the costs so paid to Mrs. Suzor.

That the appeal of the bank also be allowed, and the bill as against them dismissed, upon payment by them to the plaintiff and Mrs. Suzor of the money mentioned, with interest. But as they set up a claim in their original answer, which has been again urged upon this appeal, to appropriate a portion of the funds in their hands to the payment of cheques and notes not presented or due until after notice of Jellett's death, I think they should not be entitled to the costs of their defence or of this appeal.

PATTERSON, J. A., concurred.

OSLER, J. A.—The questions raised on these appeals are of general importance and for that reason, as well as out of respect for the opinion of my brother Proudfoot, I will briefly state my reasons for concurring with the other members of the Court in reversing the decree.

On the evidence I think it cannot be said that anything more is established against the bank than that Mr. Thomson, the manager, went to see the plaintiff at Mr. Jellett's request, about a fortnight before the money was deposited: that Jellett told him that Bailey expected to receive a sum of about \$6,000, and that it was said that this money was to be, or would be, deposited in the Bank of Commerce

Mr. Thomson said he supposed that a deposit receipt would be procured, but nothing was said as to this, and no arrangement was made otherwise, to which he was a party, as to the disposition of the money. As between Jellett and the plaintiff, it was no doubt expressly stipulated that a deposit receipt was to be sent, but this did not affect the authority of Jellett to receive it from the plaintiff's debtor.

On the 15th August he received a cheque on the bank for \$6,455, on the face of which there is nothing to shew that it was the plaintiff's money. Instead of being paid over the counter it was carried by Jellett's direction to the credit of his account.

In the statement of claim, the plaintiff's claim against the bank is put upon the ground that they had actual notice that the moneys so deposited were trust funds. That may be assumed in the plaintiff's favor, but that alone is not sufficient to fix the bank with liability for their misapplication. I suppose it will not be denied that Jellett having authority to receive this money for the plaintiff, the bank were bound to honour the cheque in question, either by payment of it to him in money, or by carrying it to his own account, or to a special account which might or might not indicate the name of the *cestui que trust*.

Taking it to be a trust account, the principles, applicable to such a case are laid down in *Gray v. Johnston* L. R. 3 H. L. C. 1, not cited on the argument. Lord Cairns there says: (p. 11), that the result of the authorities is clearly this: "In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must, in the second place, as was said by Sir John Leach, in the well known case of *Keane v. Robarts*, 4 Madd. 357, be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And as to that I think I may safely add, that if it be shewn that any personal benefit to

the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed;" and, Lord Westbury (p. 14), says: "The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honor an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honor his draft, on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so, he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a *jus tertii* as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit."

Applying these principles to the present case, I fail to see that the bank were privy to a misapplication of the trust funds in honoring the cheques drawn against it by Jellett between the 15th and 26th of August, in the absence of evidence of knowledge on their part that they were in fact drawn for purposes not connected with the trust. The case of *Foxton v. Manchester and Liverpool*

Banking Company, 44 L. T. N. S. 406, may be referred to as an illustration of the circumstances in which a bank may be ordered to make good moneys which they have permitted trustees to misapply. See also *Clench v. Consolidated Bank*, 31 C. P. 169.

The question then comes to this, whether the moneys remaining in the bank can be identified and followed as trust moneys or moneys held in a fiduciary capacity as against the defendant, the administratrix of Jellett's estate; and if so, how the payments which have been made from time to time are to be applied as between the two claimants, the plaintiff and Mrs. Suzor.

That the plaintiff's money was received by Jellett in trust was not denied, but it was said that, as regards that received for Mrs. Suzor, it was a mere legal debt. It was so, no doubt, in one sense, and the case of *Re Hindmarsh*, 1 Dr. & Sm. 129, may be referred to as shewing that the Statute of Limitations would apply to an action brought for its recovery after the statutory period. See, however, the opinion of Lord Hatherley upon this case in *Burdick v. Garrick*, L. R. 5 Ch. at p. 240. But this money was money in which Jellett had no actual interest. He was acting for Mrs. Suzor in collecting it. It had, according to his own express statement to her, though not in fact, been placed by him to her credit. If he had invested it, or purchased an estate or other property with it, she could, beyond doubt, have elected either to take the benefit of such investment or purchase, or to have a charge upon it; and, therefore, although Jellett may not have been a trustee "in the strict technical sense of the word, he was *quasi* a trustee for that particular transaction:" see *Foley v. Hill*, 2 H. L. Cas. 35, 36. I can see no distinction between the case of a solicitor and any other agent in this respect. That being so, the case of *Re Hallett—Knatchbull v. Hallett*, 13 Ch. D. 696, appears to be a sufficient authority for the contention that the plaintiff and Mrs. Suzor are respectively entitled to a charge on the balance at Jellett's credit in the bank; and also, as Mr. Scott argued, that as

between them the rule in *Clayton's Case* applies in dealing with the question of the appropriation of payments, so that the earliest drawings are to be appropriated to the earliest deposits.

The facts of this case distinguish it from *Ex parte Hardcastle—Re Mawson*, 44 L. T. N. S., 523, where it was held that trust moneys paid in by a solicitor to his own account, were not sufficiently identified to be followed against the trustee in bankruptcy. See also *Birt v. Burt*, 36 L. T. N. S. 943.

The bank have attempted on this appeal to maintain a contention on which my brother Proudfoot's judgment was, and as I think rightly, adverse to them, namely, that they had, as against all parties, the right to charge the account with the notes or drafts which fell due after Jellett's death, of which they had notice on the day it occurred. The only authorities cited on this point were *Bromley v. Brunton*, L. R. 6 Eq. 275, and *Rolls v. Pearce*, 5 Ch. D. 730. But those cases merely decide that the cheques, the subject of the action, were payable out of the estate of the donors, not that the banks on which they were drawn had any right to cash them after notice of the death of the drawers.

FULTON BROS. V. UPPER CANADA FURNITURE COMPANY.

Contract by letters.

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified, and should be prompt and immediately given. The plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered: "We do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection: *Held* (reversing the judgment of the Court below, 32 C. P. 422, that there had not been shewn "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties.

THIS was an appeal from a judgment of the Common Pleas Division, reported 32 C. P. 422.

The statement of claim was filed by the plaintiffs, Fulton Bros., on the 10th of March, 1882, against the defendants, the Upper Canada Furniture Company, for the price of a quantity of lumber sold and delivered to the defendants.

The defendants set up by way of counter-claim, that in May, 1881, the plaintiffs agreed to sell and deliver to the defendants 100,000 feet of walnut lumber, at the price of \$80 per M., and although the defendants were always ready and willing to accept and pay therefor the plaintiffs would not deliver it, but only delivered 22,981 feet thereof, being the lumber the price of which was sued for in the action, whereby the defendants suffered loss and damage to the amount of \$753.77, which they offered to set off against the claim of the plaintiffs, the residue of which they paid into Court.

The cause was tried on the 4th day of April, 1882, before Galt, J., and a jury, when the learned Judge held that a contract was not proved, as he did not think the parties were ever agreed as to size or inspection of lumber, especially the latter; and he dismissed the counter-claim, and directed a verdict for the plaintiffs for \$736, and judgment accordingly, with costs, with leave to the defend-

ants to move in term, if they saw fit. The defendants moved accordingly, and on the 23rd of June, 1882, an order was made to set aside the verdict, and to enter a verdict and judgment for the defendants; Galt, J., dissenting, and it was referred to the Master at London, to inquire and report, under section 47 of the Judicature Act, what damages had been sustained by the defendants in respect of their counter-claim.

The plaintiffs thereupon appealed, and the appeal came on to be argued before this Court on the 7th of September, 1883.*

The evidence established that the plaintiffs were lumber dealers, residing and carrying on business at Fingal, in the County of Elgin: that the defendants were manufacturers of furniture, carrying on business at Bowmanville, in the County of Durham; and that in the month of September, 1881, the plaintiffs sold and delivered to the defendants a quantity of walnut and white ash lumber amounting to \$2,938.69, at prices agreed upon, the particulars of which were set forth.

The other facts, and the letters on which the defendants relied as constituting the alleged contract, are stated in the report of the case in the Court below, and in the present judgment.

C. Robinson, Q.C., and Crothers, for the appellants.

F. E. Hodgins, for the respondents.

In addition to the cases cited in the Court below, *Hussey v. Horne-Payne*, 8 Ch. D. 670; *S. C.* 4 App. Cas. 311; *May v. Thomson*, 20 Ch. D. 705, were referred to.

December 12th, 1883. SPRAGGE, C. J. O.—The defendants' case is, that a contract on the part of the plaintiffs to manufacture and deliver to the defendants a certain quantity of walnut lumber is made out by correspondence

**Present*—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

between them and the plaintiffs. In the judgment appealed from, it was held by a majority of the Court that a concluded agreement was made out.

The rule as to making out a contract from correspondence has been stated by many of the Judges in England, and by the text writers on the Law of Contracts, including Mr. Benjamin's able treatise on the Sale of Personal Property. Osler, J. in his judgment in the Court below, adopts the language of Mr. Pollock (on Contracts, 3rd ed. 37): "In order to convert a proposal into a promise, the acceptance must be absolute and unqualified. For unless and until there is such an acceptance on the one part, of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately; in other words, proposals and counter proposals." There must be, to use the language of Sir J. Knight Bruce, in *Thomas v. Blackman*, 1 Coll. 312, "a clear accession on both sides to one and the same set of terms." In *The Oriental Inland Steam Company v. Briggs*, 4 D. F. & J. 191, Lord Campbell spoke emphatically of its being extremely desirable "to adhere strictly to the rule of the Court that whoever brings forward a contract, as constituted of a proposal on one side and an acceptance on the other, should shew that the acceptance was prompt, immediately given, unqualified, simple, and unconditional."

We find much the same language in other cases. The language employed by the parties to correspondence varies as much, perhaps, as the language used by testators in their wills; so that, as was observed by the late learned Chief Justice of this Court, in *Bruce v. Tolton*, 4 A. R. 144: "Whether there has been an agreement, the result of mutual assent, must obviously depend in each particular case upon the language employed; and a decision upon one set of correspondence may be of little assistance where the effect of another set comes in question."

I do not propose to go through all the letters written by the respective parties. The learned Judges in the Court

below, who have held that there was a concluded contract, agree that there was no such contract constituted by the letters exchanged between the parties of the 12th, 16th, 18th, and 23rd May. At the latter date the matter stood thus: After a conversation between the defendants' manager and one of the plaintiffs in April, 1881, in which, as stated correctly in the report of the case, the latter had proposed to cut for the defendants a bill of lumber to the extent of 100,000 feet, the quality of which would be equal to the best that the defendants had received on a former occasion—viz; 1st and 2nd qualities—at \$80 per M; the defendants had introduced a term into their proposal not in accordance with anything that it has been proved had theretofore passed between the parties. This was in their letter of the 18th May, and this new term was repudiated by the plaintiffs in their letter of the 23rd. There was to be an inspection, and the defendants proposed, or rather assumed that it was to be "*American inspection.*" The plaintiffs' answer was: "We do not know anything about American inspection, but will submit to any reasonable inspection."

The parties then on the 23rd of May differed as to what kind of inspection the lumber was to be subjected to; and there is no question that unless and until that difference was removed there was no concluded contract between them. The plaintiffs certainly did not, by any subsequent letter or act, assent to the defendants' proposed inspection. It is necessary to examine the subsequent correspondence to see if the defendants agreed to forego this new proposed term; and if they did so, at what time, and whether they communicated such their agreement to the plaintiffs. Their letter of the 25th, two days after the plaintiffs' letter to them, is silent upon the point. They only say: "Yours of 23rd to hand. Let us know a week before you will be ready if possible." This was followed on the 20th June by another letter from the defendants to the plaintiffs, which alludes to inspection, but not to the kind of inspection that was to be had: "When will that lumber be

ready for inspection? Let us know about what time you will be ready, so that we may try and arrange our business to go up as soon as you are ready."

The defendants may probably say: "We did not persist in requiring 'American inspection;' and upon the plaintiffs refusing to submit to it, and agreeing to any reasonable inspection, we intended to forego the kind of inspection that we had proposed, and to acquiesce in what the plaintiffs had expressed themselves willing to submit to." But it is clear that *mental* assent is not sufficient. It must be *communicated* to the opposite party. If it be said that their assent might reasonably be inferred from their absence of dissent; the answer is, that an express answer was to be looked for under the circumstances, and further a letter was written by the defendants in which the defendants should have agreed to forego *their* proposal, and assent to the plaintiffs', if they intended to do so and to bind themselves to do so. The defendants may have intended this, or they may have intended to leave it an open question. Were the plaintiffs safe in drawing the inference which the defendants now say that they might have drawn? I should say not, unless the assent of the defendants was necessarily to be implied from their letters of 20th May and 20th June, and that I think cannot be done.

It is to be remembered that the true character of the defendants' letter of the 18th May was a counter proposal, which was met by the letter of the 23rd, which was also a counter-proposal. Such being the character of these communications we have to find afterwards "a clear accession on both sides to one and the same set of terms." I do not see that we find this so far. As matters stood a clear accession was to come from the defendants to the counter-proposal of the plaintiffs embodied in their letter of the 23rd May, or an agreement on their part to forego their proposal, and accept that of the defendants. We find neither the one nor the other.

These letters were followed by several others. They

are to be looked at to see if they contain the necessary accession on both sides to one, and the same set of terms.

To take first the two next in order. In that of 4th July, from the plaintiffs to the defendants, the plaintiffs treat the matter of inspection as still an open question. "If you insist on American inspection," we must have, they say in effect, a higher price, or if you pay only the price already named you must accept "a fair lot with considerable short lumber in it." The terms of this letter are probably attributable to the increase in the price of lumber, and may have been prompted, as supposed by Osler, J., by a desire to evade the performance of a disadvantageous bargain. Assume that to have been the motive, it is none the less incumbent upon the plaintiffs to shew mutual assent to the one set of terms. The answer to this letter, dated 6th July, does not give this assent. It assents to the set of terms proposed by a former letter of the plaintiffs, that of the 16th of May, but not to any terms proposed by the letter to which it was an answer. The qualities of the lumber proposed in the two letters are different, as appears by a comparison of the two letters. The parties are not at one upon a material point.

The letter is, moreover, important in this. It assents to terms proposed by the plaintiffs before the term of American inspection was proposed by the defendants, and as far as appears upon the face of it assents to those terms for the first time. It is an answer to a letter in which the plaintiffs say: "If you insist on American inspection," &c., yet they do not say we have already agreed, or even we had already intended, to forego American inspection. It goes far to negative the supposed implied assent on their part by previous letters to forego that proposed term of agreement.

The remaining three letters are from the plaintiffs. They contain no assent to revert to the terms of the letter of the 16th of May, but, on the contrary, they propose other terms, and the defendants chose to be silent.

It is true that the plaintiffs did manufacture a quantity of lumber, and in their letters spoke of inspection; but then they were by their trade manufacturers of the article, which was the subject of proposals and counter proposals between them and the defendants, and were manufacturing the article when the correspondence between the parties commenced, and continued to do so afterwards. Whether they cut any lumber specifically to "fill" the defendants' order does not appear. If they did, it might well be that they did so in the expectation that their proposal of May 16th would be agreed to, and assuming that if it were not the article was a marketable one, and they could sell elsewhere.

What they did cannot be taken as evidence of their assent to any proposal of the defendants; and the defendants cannot say that it is evidence that they had agreed, or were understood by the plaintiffs to have agreed to forego their proposal and accept the plaintiffs'. I am satisfied that the plaintiffs were not bound to accept the assent of the defendants, conveyed in their letter of the 6th of July, to their proposal of 16th May as an assent which would constitute a binding agreement between them. It was not "prompt, immediately given," and there intervened a counter proposal followed by correspondence between the parties.

The result is, that we can fix upon no time when the parties were at one—when, to revert again to the terse language of Sir J. Knight Bruce, there was "a clear accession on both sides to one and the same set of terms."

The case is, of course, to be looked at just as if the defendants were plaintiffs suing for damages for breach of agreement.

For the reasons that I have given I am constrained to differ from the judgment of the majority of the Judges in the Court below.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

CROSSFIELD v. GOULD.

Specific performance—Time of essence of the contract.

The defendant agreed to sell to the plaintiffs certain timber limits for \$25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, and on the 20th August, the plaintiffs wrote, excusing themselves for not having carried out the purchase, and asking for an extension of time, for their accepting or refusing "your limits one or two weeks—two weeks if possible."

In answer, G. suggested that it was not necessary to make any extension of time for the acceptance of the offer by the plaintiffs, and that if they wrote stating they were satisfied with the timber, the quality and the price, and that they only wished the extension of time to make their financial arrangements, adding, "and if you do this, you can consider this letter authority for the additional time." The plaintiffs wrote accordingly, and the further time asked for expired on the 10th of September, but they failed fully to complete the purchase at the time named, and G. sold to the other defendant Miller.

Held, [affirming the judgment of Boyd, C.] that looking at the nature of the property, the subject of the contract, time would, without any stipulation in respect thereof, be regarded as essential; and it was intended by the parties that it should be so, and understood by them that it was so; and the subsequent correspondence shewed it to have been expressly made so, and, therefore, that the plaintiffs were not entitled to a specific performance of the contract.

APPEAL from the Chancery Division.

The action was instituted on the 16th of September, 1881, by *Samuel B. Crossfield, Andrew K. McIntosh, and Josiah M. Buzzell*, trading under the name of Keene Lumber Company, against *Joseph Gould and J. C. Miller*. The statement of claim set forth that Gould being the owner of certain timber limits in the Parry Sound District, the plaintiffs on or about the 15th of June, 1881, applied to him to purchase the same; and after various communications between the plaintiffs and Gould, the latter addressed and sent a letter to them in the following terms:—

"UXBRIDGE, Ont., July 25, 1881.

"KEENE LUMBER Co.,
Penetang.

RE TIMBER LIMITS.

"GENTS,—I am in receipt of yours of the 23rd, and note contents, and in reply would say, first, my sons have always asked \$30,000 for the limits, but as they have all gone into farming, and none of them wishes to work them, they have consented that I should offer them for \$25,000, one-fourth

down, balance in three equal annual instalments of \$6,250 each, with interest on the whole sum annually at seven per cent., with satisfactory security; and after you have looked them over, if you think the price satisfactory, you shall have two weeks to consult the members of your Company, and make your arrangements for the payments. * * * I do not know that it is necessary for me to write more now.

"Awaiting your reply, I remain, yours truly,

"J. GOULD."

In answer thereto the plaintiffs wrote that if the investigation referred to proved satisfactory they would purchase said limits at the price and on the terms of payment set forth; and having subsequently made the necessary investigation they determined to purchase, but in consequence of a heavy loss by fire at their mills they were at the moment unable to make the necessary financial arrangements, and on the 20th of August wrote to Gould as follows:—

"DEAR SIR,—I take this opportunity to say to you, that on account of a serious loss by fire, by which we lost \$12 to \$15,000 worth of lumber at Brentwood last week, it has, and will take considerable of our time in looking after insurance policies regarding it; and then again some of our partners reside at such a long distance, am afraid we shall not be able to arrive at a satisfactory conclusion regarding the purchase of your limits at the expiration of the time you gave us the refusal (next Saturday night); and if you will grant us an extension of time of your refusal of your limits one or two weeks, two weeks if possible, we should esteem it a favour. Will say in conclusion, that we have made up our minds to try and conclude the trade with you as soon as we can arrange our money matters for making the payments. Will go and see you as much sooner than the time asked for as possible. This fire having upset some of our calculations, a reply by return mail will very much oblige.

Yours truly,

"KEENE LUMBER CO. (SAMUEL B. CROSSFIELD.)"

In answer to which Gould wrote the following letter, which was duly received by the plaintiffs:—

"UXBRIDGE, Aug. 23, 1881.

"KEENE LUMBER Co.,

"Penetang.

"GENTS,—I am in receipt of your letter of the 20th, asking an exten.

sion of time in which to allow you the refusal to purchase our timber limits, in consequence of your serious loss by fire at Brentwood. I am exceedingly sorry for your loss, and trust that the insurance may save you a large portion of it. I may say that I should not hesitate to grant you one or two weeks longer to make your financial arrangements, (which it appears is all you want), if it would not compromise us with some others here. Mr. Miller and some others has been scolding me for not giving them a chance, and we have told them that if your Company failed in coming to time they should have the next offer; but this difficulty might be avoided by your simply writing me that you was satisfied with the timber, the quality and price, and that you only wished the extension of time to enable you to make your financial arrangements; if you do this you can consider this letter authority for the additional time. You nearly say that much in the letter before me in these words; "Will say in conclusion that we have made up our minds to try and conclude the trade with you, as soon as we can arrange the money matters for making the payments." I want to say that the timber is sold, for I am bothered with applicants for it. There is talk of a syndicate being formed about Lindsay, and are offering my son at Cobocokong fabulous prices for it, but I shall hold it for you till I am honourably released, but I think time first set in my letter quite sufficient for you to satisfy yourselves with the timber and the price; but after this fire I think you entitled to further time to make arrangements for payments, but you should write accepting as such.

"Yours truly,

"J. GOULD."

The plaintiffs further alleged that in reply to this letter they wrote and sent to Gould a letter in the words and figures following:—

"PENETANG, Aug. 25th, 1881.

"J. GOULD, Esq.,

"Uxbridge, Ontario.

"DEAR SIR,—Yours of the 23rd to hand yesterday, and in reply, you will allow us to extend our thanks to you for the expression of sympathy in our loss contained in the same, and we hope our insurance will compensate us largely for our loss; but presume that under most favourable circumstances we must lose considerably. I notice your remarks, regarding the extending of the time of refusal to us, in which we are to decide as to the purchase of your limits, and frankly admit the fairness of the same: and as you say we can as well say to-day, as one month from to-day, that we are satisfied with the timber, price, and quantity and will here state, as you required, that we are satisfied with the timber quantity and price, and that we only ask for the extension of the time to make our financial arrangements for meeting the payments, and you can consider the timber sold to us

the trade to be closed as soon as our money matters are arranged, as much sooner than the two weeks asked for as possible. We are as anxious as you can be to have it closed, as it is getting time to begin our winter's operations. Please kindly acknowledge the receipt of this by return mail, that we may know you have received this, and have the required extension of time, and you will very much oblige.

"Yours very respectfully,

"KEENE LUMBER CO'Y, (SAMUEL B. CROSSFIELD.)"

The plaintiffs contended, and alleged that Gould admitted, that the time for their accepting or refusing the offer of Gould did not expire until Saturday, the 10th of September, on which day the plaintiff Crossfield met Gould in Toronto, and offered him a marked check, payable to Gould's order for \$6,250, being the down payment of one-fourth of the said purchase-money; and also offered him satisfactory securities in the name of Flatt & Bradley, of Hamilton, on whose name alone Gould could have obtained the balance of the purchase-money from certain named banks without indorsement or any liability by him, but this Gould refused, and after considerable discussion Gould desired the plaintiffs to let the matter stand over until the following Monday, the 12th of September, when the parties were to meet at the Queen's Hotel, Toronto, on which day they met according to such arrangement, when Gould refused to carry out the agreement, and then stated that he had sold the limits to the defendant Miller for \$25,000 cash, and the horses, plant, &c., at a valuation.

The plaintiffs further stated that, "on the 25th day of August last past, the defendant Miller made an offer for the purchase of the said limits, horses, shanty, bush, and river plant, for \$25,000 cash, and the plant at a valuation, and the defendant Gould informed the plaintiffs that he accepted such offer of the defendant Miller, provided the plaintiffs did not accept his offer of the said 25th July last past within the time specified; and that by reason of the plaintiffs not having carried out the contract of purchase on the same day, that the time for their refusal to accept the said offer expired; that he was bound to accept

the offer of the defendant Miller, and did so accept it on Monday, the 12th day of September instant, and that it is impossible for him to carry out the agreement with the plaintiffs." And the plaintiffs submitted that the defendant Gould had misconceived the legal effect of the correspondence which passed between him and the plaintiffs; and they insisted that there was no binding contract between them until Saturday, the 10th day of September instant, when they accepted his offer of the said 25th day of July last, and that a reasonable time must elapse for the carrying out of the said contract of purchase * * but if the Court should hold that they were bound to carry out the same on Saturday, then they submitted that they were in a position to carry out the same, and had offered to do so.

From the statement of defence by Gould, it further appeared that the plaintiff Crossfield, on the 7th of September, had written to Gould, asking to extend the time for two or three days of the following week to get the funds ready, and on the 9th of September had sent the following telegram :

To JOSEPH GOULD, Uxbridge :

My son is away to make arrangements for meeting you; afraid he will not get back in time to meet you to-morrow. Will first of week do?

SAMUEL B. CROSSFIELD.

And that Gould, in answer thereto, wrote and sent a telegram and letter in the words following :—

" 9th September, 1881.

" To THE KEENE LUMBER COMPANY.

" I fear I cannot extend the time, having written you fully.

" J. GOULD."

" UXBRIDGE, ONTARIO, September 9th, 1881.

" KEENE LUMBER COMPANY,

" Penetang.

" GENTS,—I fear that I cannot extend the time to you for the closing of the purchase of the Christie Lumber Limits beyond to-morrow evening,

as Mr. J. C. Miller, M.P.P., Parry Sound, has taken great exceptions to my extending the time to you to two weeks ago; but I claim that I done no more for you than what I should expect from you, or Miller either, under the similar circumstances. The situation is this; on my advertising the limits for sale, I wrote several gentlemen of my acquaintance, urging them to purchase them, and Miller among the rest. Miller did not reply for some time, but sent his men into the limits to estimate and examine it. In the meantime you wrote me, and got my definite offer and price, and went into the limits to examine it and estimate the timber; and also about the time that you and Charles got into the woods, Miller wired me to meet him in Toronto and sell him the limits.

"I at once wrote him they were in your hands, that you had the refusal of them for such a time, (two weeks I think), and before the two weeks were up you wrote and got an extension of time for two weeks longer, and the very next day Miller came here with the money, and insisted that inasmuch as you had not carried out your first agreement, that he had the right to claim the limits, but I told him that you had been unfortunate, and that I had extended the time two weeks, and I should not break my word if I never sold the limits. Mr. Miller then said, if they fail to pay within the now extended time, will you sell to me at the same price. I would not promise, but called my sons, who said if Miller would take all our teams, shanty, bush and river plant, and pay all cash, if you failed, they would consent that Miller should have the limits at the same price. Mr. Miller then made a written offer of \$25,000 cash, open for thirty days and I exchanged with him a conditional acceptance, that if you failed to pay for them before Saturday night the 10th instant, that he should have them at his offer. So the matter rests. I had hoped that you would be able to pay for them, for I think that your going to look at them hurried up Miller to buy them.

"I am, yours truly,

"JOSEPH GOULD."

And on the same day (9th September) the following telegrams were received from the plaintiffs:—

"Sept. 9th, 1881.

"Hamilton,

"To J. GOULD, Uxbridge.

"Arrangements for limits completed, meet me in Toronto to-morrow, Queen's Hotel, answer to Royal Hotel, Hamilton.

"S. B. CROSSFIELD."

"TORONTO, Sept. 10th, 1881.

"Hamilton,

"To J. GOULD, Queen's Hotel.

"Will meet you at Queen's Hotel, arrive one fifteen train.

"S. B. CROSSFIELD."

And that on Monday, the 12th of September, Gould wrote as follows :—

“Re KEENE LUMBER Co. & SELF.

“GENTLEMEN,—The extended time for the completion of the purchase by you, of my limits expired last Saturday; you failed then since to complete the purchase. I should gladly have given you further time, but as I told you, I had made an arrangement for sale to Mr. J. C. Miller, which must be carried if you did not purchase within the time limited, and therefore I have no power to interfere in your favour in the matter; were I to do otherwise, I would be liable in damages to Mr. Miller. I must regret you have been unable to buy; but am obliged to write Mr. Miller to-day, according to my agreement, and complete the sale to him.

“Your obedient servant,

“J. GOULD.”

Defendant Gould also claimed the benefit of the Statute of Frauds.

The defendant Miller also filed a statement of defence, relying substantially on the same grounds as Gould.

The case came on for trial at the Sittings of the Court in December, 1881, in Toronto.

Mulock and McArthur, for the plaintiffs.

W. Cassels and Brough, for defendant Gould.

McCarthy, Q. C., and *Creelman*, for defendant Miller.

BOYD, C.—The case is based in great part on written evidence, and in part on parol evidence. As to the parol evidence, although there is some conflict, I think substantially in whatever way it is regarded it comes to pretty much the same thing.

I do not think the parties are so much at variance as to what occurred on Saturday when the transaction was to be closed. It is suggested that this written evidence—consisting of the letters set forth in the pleadings—should receive a particular construction in view of the allegations of the statement of claim. But effect should not be given to that apart from the oral evidence. I did not hear any evidence on Gould's part shewing that he understood the letter that was written to bear that special construction. Looking at the letters set forth I should come to a different conclusion; I should come to the con-

clusion that the parties, Crossfield or the Keene Lumber Company, were perfectly content to buy that property; they had inspected it and were satisfied with it,—that is, it was suitable for them, well placed, and suitable for their requirements, and they engaged themselves to make the payment within a certain time, and I think that that being suggested as a matter that would satisfy Gould they were quite willing to make it so. (His Lordship here referred to the letter dated 20th August and continued.) Looking at the letters, I do not think it is necessary to go into the matter which has been argued with some subtlety, whether this is a unilateral term, or whether it remained open: as to whether there was a proper acceptance, and whether they met on Saturday to arrange the terms of the bargain or not. The view I take of the case disposes of it without distinguishing which of these contentions is right in the abstract. The terms of this transaction are plainly enough shewn in the letters. There was no dispute as to the price Mr. Gould wanted, or as to what the other side were willing to give. Mr. Gould demanded a certain price,—\$25,000—of this, one fourth down, and the balance in three equal annual instalments of \$6,250 each, with interest on the whole sum annually due at seven per cent., with satisfactory security. Now, all the terms of that agreement, and the subject matter are set forth with sufficient accuracy, and when they write back saying that they are willing to do that, and that the bargain was closed, they undertook to pay and to give security that would be satisfactory to him.

That, I think, is the proper conclusion from all this correspondence and all these dealings.

They were unable to come to the terms, so far as the financial arrangements were concerned, at first, and after a further period of time had expired, they asked for a further extension of time, and wished to leave it open so that they had the right of refusal; but Mr. Gould puts it in a different way. He says, "I should not hesitate to grant you one or two weeks longer to make your financial arrangements (which, it appears, is all you want), if it would not compromise us with some others," etc. . . . He wanted the thing all closed, save as to making financial arrangements; and seeing that they had got into trouble on account of the bush fires, he goes on to suggest the form of the letter from them which he said would dispose of other applications; and he says, "If you

after all the banks are closed and offer me notes of people I know nothing about. They are lumbermen, and it is a precarious business."

I have no doubt this influenced Mr. Gould, and I have no doubt he had before his mind the offer Mr. Miller made; he could say "I can sell this property for \$25,000 cash on Monday; why do you expose me to a loss in tendering the notes of these men when I can get the cash?" I do not think there was anything unreasonable in that, unless it can be shewn that Mr. Gould vexatiously declined to take good security offered him. There, I think, the plaintiffs' case fails. Mr. Gould acted with proper precaution, and it was unreasonable at the last moment for these men to come down and ask him to take this security when there was no time for him to ascertain whether it was good security.

I think the circumstances of this case shew—as plainly as any case that comes before the Court—that time was regarded as of the essence of the contract. They were dealing with property that was, to the knowledge of both parties, liable to extreme hazard owing to fire. The moment it was stated it was precarious it was acceded to. Crossfield had his timber limits ravaged by fire more than once. It was that very thing that prevented the plaintiffs completing their arrangements within the time, and it was present to the minds of all that this was property of such a character that they must deal promptly and punctually with it at the time appointed. If that is so, the transaction should have been completed on Saturday. I do not see in law that Mr. Gould was bound to wait longer. There was default made; there was a breach of the arrangement, or whatever you please to call it, and I see no exculpating circumstances to lead the Court to relieve from that. This is property which is in jeopardy from fire, and in such a case the Court will consider that time is of the essence of the contract.

But Mr. Gould had engaged himself with Mr. Miller, subject to the arrangement with the Crossfields; he was in danger of losing a bargain that was more advantageous in some respects than that with the Crossfields. He might properly say to the Crossfields, "I have given you till such a time to complete your arrangements;" and to Mr. Miller "I have made an arrangement with Crossfields, and if they do not settle by the date appointed then your offer is accepted." The Court could not replace

Gould in the same position unless it held that the contract should be completed by the date appointed. The parties dealt on that footing, and the great mistake the plaintiffs made was in not ascertaining what sort of security would be acceptable to Mr. Gould, and by not being ready with such security they were not in a position to fulfil their bargain; and time being of the essence of the contract, there was a breach on that day, and I do not see that I can restore them to that position which they by default have lost. Mr. Gould was just as much exposed to loss by his timber being burned as they, and it was his business to sell the property in the most expeditious way he possibly could. I do not pretend for one moment to reflect upon the financial position of Flatt & Bradley, but what I mean to indicate is that it was unreasonable at the last moment—after the banks had closed—to present their paper as sufficient security to Gould who did not know them. If he had known in sufficient time, he might have made inquiries as to Flatt & Bradley, and have ascertained that he would have been quite as safe in taking that as security on land; but it was thrust upon him at the last moment—when he had no knowledge of these men—and had never signified his intention previously, or led the plaintiffs into the belief that that class of security would satisfy him, and it was only upon the spur of the moment that the plaintiffs were able to procure even this security.

This case must be disposed of just as if there had been a gap of a month or a year; I do not think the shortness of the delay is, in this case, material; the fact is that they did not complete the contract, and the contract was as effectually broken when not closed at midnight of the day named as it could be by any length of delay.

I do not see that I can do anything but dismiss the action, with costs.

From this judgment the plaintiffs appealed, and the appeal came on to be heard on the 14th of March, 1883.*

Moss, Q. C., and W. N. Miller, for the appellants.

S. H. Blake, Q. C., and W. Cassels, for respondent Gould.

McCarthy, Q. C. and Creelman, for respondent Miller.

* *Present.*—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ.A.

On behalf of the appellants it was contended that the Court below had erred in treating the case as one in which time was of the essence of the contract, and refusing all relief in the action on the ground that Gould had the power to put an end to the rights of the plaintiffs after the 10th of September, and had effectually done so: no issue on that point had ever been raised on the pleadings, and the plaintiffs had gone down to trial totally unprepared to contest such a case. Besides the facts elicited in the case do not support such a contention, so that even if the point had been distinctly raised by the pleadings, the learned Chancellor erred in determining that time was of the essence of the contract.

Admitting, however, that time was and was originally intended to be of the essence of the contract, that term had been expressly waived by Gould granting to the appellants an extension of time within which the bargain was to have been completed.

On behalf of the respondents it was contended that there was not any contract capable of being enforced; and that under the circumstances of the case, and looking at the peculiar nature of the property the subject of the contract, time was necessarily of the essence of the contract without any express stipulation that it should be so.

Pendergast v. Turton, 1 Y. & C. C. C., 110; *Clegg v. Edmondson*, 8 D. M. & G. 787; *Hudson v. Temple*, 29 Beav., 536; *Barclay v. Messenger*, 43 L. J., Ch. 4 49, 22 W. R., 522; *Cope v. Albinson*, 8 Ex. 185; *Lehmann v. McArthur*, L. R. 3 Ch. 496; *Pincke v. Curteis*, 4 Br. C. C. 329; *Hipwell v. Knight*, 1 Y. & C. Ex. 401; *Magennis v. Fallon*, 2 Moll. 561; *Monroe v. Taylor*, 8 Ha. 51; *Hudson v. Bartram*, 3 Madd. 440; *Roberts v. Berry*, 16 Beav. 21; *Lord v. Stephens*, 1 Y. & C. Ex. 222; *Green v. Low*, 22 Beav. 625; *Hearne v. Tenant*, 13 Ves. 287; *Parkin v. Thorold*, 2 Sim. N. S. 1; *Newman v. Rogers*, 4 Br. C. C. 391; *Spurrier v. Hancock*, 4 Ves. 667; *Patrick v. Milner*, 2 C. P. D. 342; *Walker v. Jeffreys*, 1 Ha. 341; *Parker v. Frith*, 1 S. & S. 199 n.; *Seaton v. Mapp*, 2 Coll. 556; *Wells v. Maxwell*, 32 Beav. 408; *Nokes v. Lord*

Kilmorey, 1 D. & Sm. 444 *Fry* on Spec. Per. (2d Ed.) Secs. 1045-9, 1052-6-9, were referred to.

December 11, 1883. SPRAGGE, C. J. O.—The plaintiffs seek specific performance of a contract for the sale to them by the defendant Gould of a species of property peculiar, I believe, to this country, viz., of timber limits. After some correspondence, a price was agreed upon, \$25,000. The times for payment were also agreed upon, viz., one-fourth cash in hand, and the balance by three equal annual instalments, with interest, “with satisfactory security.”

I have before me a resumé of the correspondence between the parties. I will refer to such portions only as are material to the points in issue between the parties.

The first point upon which they differ is, as to the time when there was a concluded contract between them. The negotiations for purchase commenced on the 17th June, 1881; but it is not necessary to refer to any letter before that of the 23rd July. The plaintiffs, by letter of that date inquired of defendant Gould as to his terms, mentioning that “some of our company lives in the Eastern States;” and that some time would be necessary to decide, after looking over the limits. Gould’s answer to this was given by the letter of 25th July; he states his price and terms of payment, as I have stated them above, and adds, that after looking over the limits, they, if they thought the price satisfactory, “shall have two weeks to consult the members of your company and make your arrangements for the payments.” This contemplated two weeks to be given for the plaintiffs making up their minds, and also making arrangements for the payments. By subsequent agreement, however, the two things were separated, and the time made definite as to each.

The next letter is from the plaintiffs, and is dated August 20th, which was a Saturday. In it the plaintiffs ask for further time in order to arrive at a satisfactory conclusion in regard to their proposed purchase. They say they are

afraid that they will not be able to close "at the expiration of the time you gave us the refusal, next Saturday night." They plead the occurrence of a heavy loss by fire, and say, "If you will grant us an extension of time of your, (it should be our,) refusal of your limits one or two weeks—two weeks if possible, we should esteem it a favour;" and they speak of trying to "conclude the trade" with Gould. This letter fixes the time at which, by previous agreement the plaintiffs were to carry out their purchase, if they elected to do so, *i. e.* the Saturday following its date, which would be Saturday, 27th August. The full further time they asked for was to Saturday, 10th Sept. At the date of the above letter, the two defendants, Gould and Miller, were in correspondence in regard to the purchase by the latter of the same timber limits; but no bargain, provisional or otherwise, had been made:

Gould in his letter to the plaintiffs dated 23rd August, mentions this, and suggests the form of a letter to be addressed by the plaintiffs to him, which he might use in answer to Miller's application; and he grants to the plaintiffs further time for one purpose, *viz.*, to make their financial arrangements, and for that purpose only; and adds: "but I think the time first set in my letter quite sufficient for you to satisfy yourselves with the timber, quality, and price."

This was perfectly understood by the plaintiffs, as is apparent from their letter of August 25th, in which, referring to what Gould had said as to extending the time for them to decide as to their refusal or not, they say, "We frankly admit the fairness of the same," and as to the other purpose for which time was asked, they say: "We only ask for the extension of the time to make our financial arrangements for meeting the payments; and you can consider the timber sold to us, the trade to be closed as soon as our money matters are arranged—as much sooner than the two weeks asked for as possible." The plaintiffs were to have had to the 27th, two days longer, to make their election. That may still have been an understood thing between the

parties, or the plaintiffs may, on the 25th, have made up their minds to purchase. How that may have been is immaterial.

On the 26th Gould wrote, saying he was pleased to hear that the plaintiffs were satisfied with the quality and price of the timber, that he considered they had bought; and trusted that they would "have no difficulty within the extended time to make the payments all satisfactory, in accordance with my offer."

On the day before this last letter, Gould received an offer by letter from Miller of \$25,000 cash for the limits—taking the plant at a valuation—the offer to be open for thirty days. Gould's answer is dated the same day, and in it he explains that he is under conditions by reason of an offer made to him by the plaintiffs, which conditions would expire at the farthest in sixteen days from the date; and promises that in the event of the plaintiffs failing to purchase, he will, after the expiry of that time, accept Miller's offer, and conclude a contract 'upon the terms offered by him.

The position then of the parties, the plaintiffs, Gould and Miller, was this: the plaintiffs had either elected to purchase, or had to the 27th to do so; and they had further to the 8th of September to make their financial arrangements for payment of the purchase money. This was the contract between Gould and the plaintiffs; and Gould, also had a contract, a provisional one, with Miller, to sell to him upon terms agreed upon in the event of the plaintiffs failing to complete their contract of purchase, on or before the 10th of September.

The plaintiffs' contention is, that the time for the plaintiffs' exercise of their option of purchase did not expire till the 10th of September; that there was no binding contract between them and Gould until that day; that on that day the plaintiffs' accepted his offer; and that a reasonable time must elapse for the carrying out of their contract of purchase. This cannot be contended successfully in the face of the correspondence, which I have summarized. Between them

the 27th of August was the last day for the exercise of option by the plaintiffs, and the 10th of September was the last day for making the agreed payment on account, and giving security for the balance.

To my mind there is no room for doubt that although time was not expressly made of the essence of the contract, yet that it was intended by both parties that it should be so; and understood by them both that it was so. The correspondence shews this unmistakably. Mr. Fry says, (p. 464, 2nd ed.): "Time is originally of the essence of the contract in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so; and not to have been inserted as a mere formal part of the contract." The language of Alderson, B., in *Hipwell v. Knight*, 1 Y. & C. Ex. 415, and other authorities, support this position

Then the subject of the contract is to be looked at; and if it be a matter of commercial enterprise the Court will be disposed to regard time as essential. A sale of mines is an instance of this. In *Prendergast v. Turton*, 1 Y. & C. Ch. 98, which was a case of contract for the sale of mining property, Knight Bruce, V. C., puts a contract for the sale of such property in terms which aptly describe such property as was the subject of the contract in this case: "This is a mineral property," (substitute for this a timber limits property,) "a property, therefore, of a mercantile nature, exposed to hazards, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing a considerable amount of profit in one year, and losing it in the next."

Further, we have this passage in the plaintiffs' own letter, of August 25th: "We are as anxious as you can be to have it closed, as it is getting time to begin our winter's operations."

Then, further again, the plaintiffs were informed by Gould's letter of the 23rd August, of there being others proposing to purchase. "Mr. Miller and some others has been scolding me for not giving them a chance; and we have told them that if your company failed in coming to

terms they should have the next offer." It seems to me impossible, in the face of all this, to doubt that it was perfectly understood by the plaintiffs, as well as by Gould, that time was an essential element of the contract. There is in the case a combination of circumstances bringing it within the rule.

On the 7th of September, three days before the day fixed between Gould and the plaintiffs for the completion of the contract, the plaintiffs ask for further time, pleading losses by fire and loss of time in extinguishing it. They say they hope to be able to fulfil their engagement during the current week, or early the following week; and ask for two or three days of that week for the purpose. I may observe in passing, that almost every sentence of this letter evidences the understanding of the writers that they were bound to complete their contract on the day named.

Gould, on the 9th, telegraphed that he feared that he could not extend the time; and in his letter of the same date explained to the plaintiffs why he could not—in substance, that his provisional contract with Miller placed it out of his power; that he could therefore do no more than give the plaintiffs to Saturday, the 10th, that being the time which he had named to Miller as the farthest date that the plaintiffs had to complete their contract.

We come now to what took place on Saturday, the 10th, when the parties met in order, if it could be done, to the completion of the contract by the plaintiffs.

There was no difficulty as to the down payment of the one-fourth of the purchase money. The difficulty was as to giving of security for the balance. The plaintiffs were to give "satisfactory security." If it be conceded, upon the authority of *Lord v. Stephen*, 1 Y. & C. Ex. 222, that the contract was to be at an end only upon the failure of the plaintiffs to furnish *reasonable* security, upon which I desire to express no decided opinion, the question remains whether the security offered was such as Gould could not, without being unreasonable, refuse to accept. There is some little conflict of evidence as to what security was

offered, and as to whether Gould agreed to give further time till the following Monday to complete their arrangements. The plaintiffs, by their delays, placed Gould in a position of great difficulty. They did not at any time before they met on Saturday submit to him any proposal as to the security to be offered, so as to give him time for consideration and inquiry; and what I find upon the whole of the evidence to have been offered was this: 1st, security by mortgage of the limits themselves; 2nd, the payment of one dollar upon every thousand feet of lumber cut; and 3rd, the personal security of Messrs. Flatt & Bradley dealers in lumber, carrying on business in Hamilton. The first was objectionable and was objected to, because the subject of it was liable to destruction by fire; and the correspondence shews plainly how great an element of danger that was; and the same objection would apply to the second. Further, as to the first, the value of the security would be diminishing as the timber was being removed (and the timber limit is called a small one,) and further, as to the second, would be the trouble and perhaps difficulty of collecting it, and it would be practically only a personal liability by the company. As to the third, the security might be very good, or might not. There is some evidence that Messrs. Flatt and Bradley were of good business standing; but Gould had no opportunity of verifying this; and besides the value of their personal security at the future dates when the other instalments of purchase money should fall due, might be a very different thing from its value on the 10th of September.

I think a fair test of the security offered is whether it was security that a prudent and cautious man would have lent the sum of \$18,750 upon; or that a trustee having money to invest, without being restricted as to the mode of investment, could properly invest trust money in. I should say that it was not such security as would be accepted by one or the other.

The words of the contract primarily import something more than would the words sufficient security. Satisfactory

means satisfactory to the person who is to receive the security ; and it strikes me that a strong case must be made out of unreasonableness in refusing to be satisfied, before the Court would force upon such a party the acceptance of security to which he objected. A refusal of securities in which trustees are by law authorized to invest, or the security of first mortgages upon real estate of sufficient value, might be adjudged unreasonable ; but all the classes of securities that I have suggested are widely different from the securities offered by the plaintiffs in this case.

I feel satisfied that Gould was not bound to accept them as a compliance with the terms of his contract.

The other point, the alleged agreement by Gould to extend the time for the completion of the contract to the following Monday, is not made out by satisfactory evidence. The result of the evidence upon that point is, that being pressed for such extension of time he at least doubted whether he could grant it, and went no further than to say that he would return on the Monday and see after taking legal advice whether he could do it.

But suppose it proved that Gould had made such promise, it was an engagement that he could not make, consistently with his provisional contract with Miller, and would probably have given rise to a suit between the same parties, with Miller for plaintiff. And it appears from the evidence that Gould himself believed that his contract with Miller disabled him from giving the extension of time asked for ; and this renders it extremely improbable that he did agree to such extension of time.

I think the answer states the defence sufficiently.

In my opinion the learned Chancellor was right in dismissing the action. I think he could not have done otherwise.

The appeal should be dismissed, with costs.

I desire only further to observe, that although in the judgment that I have just delivered I have referred to only a few of the twenty-four cases cited in the argument, I have examined them all, and some others besides. To have

pointed out the distinctions between them and the case before us would have swelled my judgment to an unreasonable length.

BURTON, J. A.—This is, I think, a very clear case; and having regard to the peculiar nature of the property, and the risks to which it is exposed, the large amount involved, and the important consideration, that in commercial enterprises of this nature no doubt should be entertained of the inclination of the Courts to hold time to be of the essence of the contract, I regret that we had not retired for a few moments after the argument, and have given a decision at once, especially as some of us were compelled to leave immediately after the rising of the Court, and were unable to give any consideration to the case till recently.

For myself I felt convinced, after hearing the case argued, that the decision of the learned Chancellor was correct, and a re-perusal of the evidence after an interval of some months has only confirmed that impression.

I concur entirely with the Chief Justice, that the appeal should be dismissed, and the judgment affirmed.

PATTERSON and MORRISON, JJ. A., concurred.

McEWAN v. McLEOD.

Arbitration—Consent reference—Appeal—Charter party—Breach of contract—Measure of damages.

Held, affirming the judgment of the Queen's Bench (46 U. C. R. 235), that an appeal will lie from an award made pursuant to a consent reference at *nisi prius* under section 205 C. L. P. Act.

On the 3rd October the plaintiff chartered "The Erie Belle," a vessel owned by the defendants, to carry salt from Goderich to Milwaukee at 75 cents a ton. On the 11th October the defendants telegraphed informing the plaintiff that this vessel could not go, and requesting him to accept the services of another. Thereupon some correspondence ensued between the parties, the plaintiff insisting upon the defendants performing their contract, and they finally agreeing to do so. During all this time the plaintiff could have had the salt conveyed by other vessels at \$1.00 per ton, but did not, preferring to wait for the defendant's vessel which was loaded on the 25th of November. Owing however to the apprehensions of the captain as to the weather, which deterred him from going out, the vessel was frozen up in Goderich harbour, and it was then impossible to forward the salt otherwise than by rail; and for the purpose of endeavouring to carry out a sale which the plaintiff had made, he did send several tons by rail, and paid his consignee the difference in price for salt which he had to buy in Milwaukee and that agreed to be paid to the plaintiff.

The difference of expense in sending by rail and that agreed to be paid to the defendants, amounted to \$3.25 per ton.

Held, affirming the judgment of the Court below, that the plaintiff was not bound at the peril of losing all claim against the defendants for any additional loss, to have chartered another vessel at \$1.00 per ton, on receipt of the telegram of the 11th October; and that, under the circumstances, the plaintiff was entitled to recover the difference paid to his consignee as also the excess of freight. [CAMERON, J., dissenting, who thought that the sum of 25 cents per bushel, allowed by the arbitrator, the advance in freight for which the salt could have been carried, was all that the plaintiff was entitled to recover.]

THIS was an appeal by the defendants from the judgment of Osler, J., reported, 46 U. C. R. 235.

The facts giving rise to the action, the points raised, and the authorities cited, appear clearly in the report of the case in the Court below, and in the present judgment.

The appeal came on to be heard before this Court on the 13th September, 1882.*

J. K. Kerr, Q. C., for the appellants.

Bethune, Q. C., for the respondents.

January 22, 1884. SPRAGGE, C. J. O.—It was held in

**Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, J. J. A., and CAMERON, J.

this case in the Court below that the award made by the arbitrator Mr. Fisher, a barrister residing at Stratford, is appealable. This appeal is from that decision in the first place.

The reference in this case was by order of the Court at *Nisi Prius*, a verdict being taken in the usual terms. The reference was by consent, and could not otherwise have been made, the cause of action not falling within either of the classes of cases in which a compulsory reference might be made under the C. L. P. Act, ch. 50 of the R. S. O., either under sec. 189 or 195. An award made upon a reference under either of these sections, is made appealable.

The order of reference in this case contains a provision by consent that either party shall have the right of appeal. This was inserted in the order under the idea, well or ill founded, that section 205 of the same Act applies to such an order of reference as was made in this case.

The portion of the Act which relates to arbitrations and awards commences with section 189, and has this general heading, "Provisions for the more expeditious determination of matters of mere account by reference to referees or arbitrators;" and under this, by way of a sub-division, are the words, "In cases in the Superior Courts," and these extend to section 197, inclusive; then we have the heading to another sub-division, "In cases in the County Courts," comprising sections 198, 199, and 200. Then we have another heading in the same type as the sub-divisions I have noticed, but not falling properly under the general heading unless it be intended to apply only to "matters of mere account."

The heading is, "Voluntary submissions to arbitration." If intended to be confined to "matters of mere account," the reference in this case is not within the provisions of the sections of the Act under that heading. If not confined to matters of mere account, as I think it is not, the question is whether the reference in this case under order of Court at *nisi prius* is a "voluntary submission to arbitration."

This heading appears to cover sections 201 to 205, inclusive, when we have another heading, "motion to set aside awards," comprising only section 206; then follows the heading, "miscellaneous provisions," extending to section 227; after which follow enactments not relating to the subject of arbitrations.

Under the heading "Voluntary submissions to arbitration," is a clause section 204, which is general, applying to references by order of Court as well as by voluntary submission; and the place of which would more properly be under the head of "miscellaneous provisions," than where it is.

Section 205 is the one, if at all, by which a party upon the reference in this case is enabled to appeal. I mean of course to appeal as distinguished from moving to set aside an award. The section runs thus: "In the case of a voluntary reference to arbitration, where it is agreed by the terms of the submission that there may be an appeal to one of the Superior Courts, this Act shall apply, and the reference shall be conducted, and an appeal shall lie in the same manner as in case of a reference under section 189."

I have examined with some particularity these several enactments of the C. L. P. Act, and the headings under which they are grouped, because they have led me to entertain grave doubts whether section 205 applies to a reference by order at *Nisi Prius*, although that order be by consent; and I have felt the more pressed by these doubts upon finding that in *Nagle v. Latour*, 27 C. P. 137, the learned Chief Justice of that Court expressed as the opinion of the Court upon section 10 of the Act, (the section corresponding with section 205 in the Rev. Stats.) that while "the framers of the Act possibly may have intended to apply all its provisions to all references, the language used does not, we think, so provide." This was indeed a dictum only, inasmuch as the order of reference did not in that case contain a clause giving leave to appeal. Still the language used seems more appropriate to a submission

under the Statute of William, than to an order of reference, even though by consent. I refer particularly to the description in section 201 of a voluntary submission: "Every agreement or submission to arbitration by consent, whether by deed or in writing not under seal, may, on the application," &c. Again, the commencement of section 205 following section 204, applying to different kinds of references, applies, as if by way of limiting the generality of section 204, to the "case of a voluntary reference to arbitration."

There is not a little in the language of the Act to create doubt, but there are some words in section 201 that shew. I think, that the Legislature intended to comprehend orders of reference made in Court under the words "voluntary submissions." I allude to the provision that agreements or submissions may "be made a rule or order of any of the Superior Courts of law or equity, or of a County Court in actions pending in such County Court." This must of course apply to actions pending in the Superior Courts as well as in the County Courts; and inasmuch as references in actions pending may be, and I believe as a matter of practice ordinarily are, made by order of the Court or of a Judge, it must be taken to include such orders of reference. Further, while "voluntary submissions" may be taken primarily to mean submissions by agreement of parties out of Court the words taken in the connection in which they are used, following a set of enactments in relation to compulsory references, may well be taken to mean voluntary, as distinguished from compulsory references.

It was reasonable and proper to allow appeals in cases of compulsory references, and they are probably granted by analogy to proceedings in Courts of Equity. It was a great step further, and a reversal of long time settled principle, to allow appeals upon the merits, from the decision of a forum of the party's own choosing. It is not for us to say whether this departure is wise or not, but if an appeal be allowed in such cases it would be a thin distinction to allow it where there is a reference without the pendency of a cause

in Court, and to deny it where there is a cause pending, whether the reference be by order of Court or otherwise, the instrument of reference in the one case, as in the other, providing by consent that parties may appeal.

I have, therefore, after some hesitation, come to the conclusion that the learned Judge appealed from was right in holding that an appeal lies from the award made in this case.

Upon the merits of the case, in the ordinary sense of the word "merits," there is really no room for question. The defendants, through their partner the defendant McLeod, deliberately broke the contract entered into between the master of their vessel the "Erie Belle," and the plaintiff, on the 3rd of October, and of which he was informed on the 6th; and the reason for this breach of contract was the offer of a more profitable employment of the vessel by a third party. And this was the more inexcusable as the defendant McLeod had himself, on the 17th September, asked the plaintiff by letter if he would furnish a cargo of salt to ship to Chicago at the end of October.

I agree with the learned Judge whose order is appealed from, Mr. Justice Osler, that the contract was, that the defendants should load and carry by a certain time—*i. e.*, when the defendant's vessel should first arrive in Goderich after leaving Kingston on the 4th of October—the cargo of salt in question; or perhaps, to construe it more strictly, the loading and carrying was to be within a reasonable time: that both parties agreed that a reasonable time would be any time in the month of October, and that the master of the vessel agreed to call at Goderich for this cargo of salt on the trip up from Kingston of the "Erie Belle," leaving Kingston on the 4th of October.

The arbitrator as well as the learned Judge have come to the same conclusion, that there was not any substituted agreement, and in this I entirely agree. The plaintiff held the defendants to their contract, but not to its *literal* fulfilment. He would have accepted the carriage of his cargo by some other vessel than the "Erie Belle," provided it was

a vessel of the same class; and he did not hold the defendants strictly to carry the cargo within the time which both parties contemplated. It was a matter of great interest to him to have it carried before the close of navigation, and he made pressing representations to the defendants to that effect.

I have carefully read the correspondence and the *vivâ voce* testimony. I do not find that the plaintiff was in any respect in the wrong, unless it was in not promptly engaging another vessel at a higher, yet reasonable rate; and that was a wrong, a detriment to his own interests, of which the defendants cannot, under the circumstances, complain. He would, in doing so, be acting within his rights, and clearly had a right to exact the difference in cost from the defendants.

The arbitrator, as I read his judgment, appears to have assumed that the plaintiff was bound to exercise that right. Upon that it is sufficient to say that under the circumstances existing in this case, and taking into account what was passing between him and the defendants, it does not lie in their mouths to say that he was guilty of negligence in not exercising that right, and that their breach of contract is thereby excused.

Taking the defendants' contract to have been to carry this salt within a reasonable time, we have it from the defendant McLeod himself that there was a breach of that contract. I have already observed upon its deliberate breach in not sending the "Erie Belle" to Goderich. We have this further from the evidence of McLeod, that after the telegram of the 11th of October, he made no effort to get another vessel. And this also further, that to give the vessel time to take the salt safely to Milwaukee that season, he thinks she should have been loaded not later than the middle of November. In fact she was not loaded until the 25th of that month. She remained in port in consequence of an expected storm until the 28th, when the captain ventured out; but as the arbitrator says: "A few hours brought the expected storm, and he had to go into

port again." The vessel was soon after dismantled, and remained in port through the winter.

It has not been contended, and I do not think that such contention would be tenable, that the plaintiff compromised his rights by allowing his salt to be put on board so late in the season. He thereby afforded the defendants an opportunity, late though it was, of carrying their cargo safely if they could that season. If they had succeeded, it would not have followed that they would have exempted themselves from liability in not carrying within a reasonable time; but the damages sustained by the plaintiff would probably have been less than the damage sustained by their not carrying during that season at all, and it was for the defendants rather than the plaintiff to judge whether it was judicious to attempt the voyage at that season of the year. There was at that time a clear breach of their contract. The plaintiff allowing his salt to be shipped ought not, I conceive, to be regarded as a condonation of that breach; but as allowing the defendants if they could, and as far as they could, to retrieve it.

I agree with Mr. Justice Osler as to the measure of damages to which the plaintiff is entitled. He says, and I agree with him, that "In whatever way you look at this case the defendants are not entitled to ask for any abatement of the damages by reason of the fact that the plaintiff might have chartered, but did not charter a vessel at the rate of \$1 per ton during October or November." It would be punishing him for not exercising his strict rights against the defendants; and visiting upon him the consequence of their default. He did not abstain apathetically from doing any thing but exerted himself as far as was reasonable, to avert or repair the consequences of their default; and I judge from the correspondence that the defendants were unwilling that the plaintiff should do that which they now say that he ought to have done. If it were otherwise, nothing was easier for them than to authorize him to engage a vessel at that rate; but this, as I gather from the evidence, they were careful to abstain from doing.

It is not contended that the damages adjudged by the order appealed from are too remote, or that for any reason the defendants are not liable to them if they are fixed with liability at all for the breach of their contract with the plaintiff. In my opinion the damages adjudged are all the consequences, and not the remote consequences, of the defendants' breach of contract; and that the order appealed from is right.

Since preparing the foregoing, my brother Cameron has made a question as to the measure of damages, and refers to *Horne v. The Midland R. W. Co.*, L. R. 8 C. P. 131—the case of a contract which had been made by the plaintiff for the delivery of army shoes to the French Government. That case, however, was dealt with by the learned Judges who were in favour of limiting the damages to be recovered as a very exceptional one. The damages, as put by Blackburn, J., sought to be recovered were not those which, in the ordinary course of things, would naturally arise, but were of an exceptional nature, arising from special and peculiar circumstances; and these circumstances were not communicated to the defendants the railway company. The chief Baron was of opinion that the only damage that could properly be considered was the difference between the market price at the time when the goods ought to have been delivered, and the market price at the time when they were delivered, and that was really, taking into account the difference of circumstances, the measure of damages in this case.

They were not damages of an exceptional nature arising from special peculiar circumstances, but from an increase of market value arising upon the close of navigation between the producing country, which was also the country of shipment, and the country of use and consumption, to which the defendants' contract was to carry the goods. I do not think that the case cited applies to the case before us. My brother Patterson, in the judgment which he has prepared, discusses this point more fully than I have done. In my opinion the appeal should be dismissed, with costs.

I may add, that in a case heard before us since the hearing of the appeal in this case, *Monteith v. Merchants' Despatch Co.* (a) and in which judgment will be given to day, I have discussed the question of quantum of damages at greater length than I have discussed the same question in this case.

BURTON, J. A.—I was surprised at the objection as to the right to appeal, after the express admission in the reasons of appeal, that the now appellants did not object, and do not object, that no appeal lies from the award, but that it was too late and ought not now to be entertained; but I think the construction of section 205, which is contended for, is too narrow.

It would be strange, indeed, if we found the Legislature providing for a voluntary reference where no suit was pending, and making no provision for a reference of that nature in a pending suit, and unless compelled to do so we should hesitate long before placing so restricted a meaning upon the words employed. The language is very general, applying to any voluntary reference, and although the words of the Act from which the section in the Revised Statutes is taken granting the appeal are not the best that could have been selected to convey the meaning intended, I do not think it would be reasonable to construe them as restricting the general application, but rather as pointing to the statutory mode provided for proceeding to and conducting appeals in the case of compulsory references.

There is nothing before us to shew that the appeal was not in time, and it is positively averred in the reasons against the appeal that it was taken within fourteen days from the filing of the award.

Upon the merits it seems to me that the plaintiff has not furnished sufficient evidence to enable us intelligently to deal with the damages. One rule in a case like the present, where the action is for not delivering at a fixed time or within a reasonable time, for estimating the dam-

(a) Post 282.

ages is, that the plaintiff is entitled to recover the difference between the value of the goods to him at the place of delivery, if they had been delivered at the proper time, and their value at the time they were actually delivered. The value at the time that they ought to have been delivered is shewn, but there is no evidence of their value at the time they were actually delivered. If the value remained the same the only damage which the plaintiff would have sustained would have been the loss of interest and such expenses naturally arising from the detention. A rule which would be proper in the case of the actual loss of the goods can have no application to a case in which the delivery is merely delayed; in the present case the goods were not actually delivered until after the commencement of the suit, but that cannot affect the principle upon which the damages are to be assessed.

The plaintiff would, I think, be entitled to this difference in value if shewn, to the loss of interest and to expenses properly and naturally arising from the detention of the goods. But in the absence of evidence of value at the time of delivery, it appears to be impossible to estimate them. Probably the plaintiff may be said to make out a *prima facie* case by proving the market value of the goods at Chicago at the time of the breach, and that it rested then with the defendants to reduce that amount by shewing not only the subsequent delivery of the goods, but their market value at that time.

As the learned Chief Justice and my brother Patterson have come to the conclusion that the judgment of the learned Judge below can be sustained for the reasons given by them, it is not necessary that I should express any opinion; but for the reasons which I gave in a recent judgment, *Hendrie v. Neelon* (a), I should have been inclined to the view that the learned arbitrator's judgment ought not to have been varied, it being a well established rule of the common law that the damages to be recovered for a breach

(a) A *nisi prius* case not reported.

of contract must be shewn with certainty and not left to speculation or conjecture.

I should have been inclined to think therefore that the onus was upon the plaintiff to shew by clear and satisfactory evidence what damage he had sustained. A learned Judge has somewhere said, "to doubt is to affirm," and acting upon that view I concur in affirming the judgment.

PATTERSON, J. A.—I think the judgment appealed from is correct. The right to appeal is clear, as shewn by Mr. Justice Osler in his judgment in the Court below, and by his Lordship the Chief Justice in the judgment he has just delivered.

I take the same view of the facts which was acted on in the Court below. The contract to carry was kept open by the dealings of the parties, who by their correspondence and conduct placed it in the position of a contract to carry the salt to Milwaukee at some time before the close of navigation. I do not say that the plaintiff would necessarily have been bound to so long an extension of the "reasonable time," if he had chosen to insist peremptorily upon an earlier performance; but under the circumstances I do not think the defendants can ask the Court to hold, for their relief, that he was in default so long as navigation remained open. Certainly the date of 11th October cannot, be adopted as a time at which the parties were at arms length, and the time as of which their rights must now be adjudicated upon.

Then if the agreement was that the plaintiff should at some time, not later than the close of navigation, have the cargo of salt delivered at Milwaukee for seventy-five cents a ton, what is the measure of damages to which the defendants can limit the plaintiff?

On this point I have carefully considered the authorities to which we have been referred, including those cited by Mr. Justice Osler in his judgment; and I have looked at some other late cases, such as *France v. Gaudet*, L. R. 6 Q. B. 199; *Horne v. Midland R. W. Co.*, L. R. 7 C. P. 583;

8 C. P. 131; *Simpson v. London and North Western R. W. Co.*, 1 Q. B. D. 274; *The Paruna*, 1 P. D. 452, 2 P. D. 118.

The general rule, with reference to which all the cases have been decided, may be stated in the words of Kelly, C. B., in *Horne v. Midland R. W. Co.*: viz., "That the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The Judges who took part in the judgment of the Exchequer Chamber, in *Horne's Case*, differed in opinion as to the application of the rule to the peculiar circumstances of that case, but they all agreed upon the principle.

In this case the parties undoubtedly contemplated the sale by the plaintiff of his salt in Milwaukee, within some reasonable time after its arrival there, and it would be going to an extravagant length to assume that they did not contemplate its sale before the opening of navigation the following spring.

Setting aside the fact of the plaintiff's contract to sell the cargo, which may not have been within the defendants' knowledge or contemplation, the contract was, that the goods were to be in Milwaukee, where the plaintiff intended to sell them, by the close of navigation. If they had been there, could he have sold them at a profit? The evidence is, that when navigation closed salt went up to \$8 a ton; and that is the only evidence of its value at that period, or through the winter, which we have. I gather from the evidence that its cost to the plaintiff laid down in Milwaukee at 75 cents freight, and after paying insurance, &c., would have been under \$3.75 a ton. He ought, therefore, if he had sold at \$8, to have made a profit of over \$2,000 on the 500 tons. The fact of his contract to sell it at \$5.25 per ton may be available as

evidence for the defendants, by lowering the value to be deduced from the other evidence; but that contract was made in September at the then market price. If we were to take \$5.25 as the value at the close of navigation, and \$1.50 as the profit per ton at that price, the loss would be \$750, which is more than the plaintiff has been allowed.

Testing the damage by what it would have cost to do, after the close of navigation, what the defendants had contracted to do before it closed, viz., to carry the salt to Milwaukee, the damages would be \$3.25 a ton, for the excess of the railway freight and cartage over 75 cents, making upwards of \$1,600. This last is probably the most direct way of estimating the right to damages. The plaintiff does not claim upon any of these bases. He does not ask speculative damages, but only to have his actual loss made good; and he shews that by the arrangements he made he was able to mitigate that loss to the amount which has been found in his favour by the Court below.

We do not, in my opinion, transgress any rule of law by affirming the judgment.

CAMERON, J.—The grounds of appeal in this case raise two distinct questions, one presenting a question of practice, as to the time within which an appeal to the Court from the award made by an arbitrator where a verdict by consent has been taken must be made, and the other, as to the proper measure of damages on the contract and evidence presented to the arbitrator.

On the first question the facts appear to be, that at the sittings of the Courts of Assize and *Nisi Prius*, held at Goderich on the 4th day of October, 1880, a verdict was taken for the plaintiff for the sum of \$500, subject to be increased, reduced, or a nonsuit entered, or verdict rendered for the defendants, by the award of James Fisher, barrister-at-law, to whom all matters in difference were referred; award to be made on or before the 1st day of March next after the date of the order of reference. The order of reference contained the following, among other provisions: "It is further or-

dered, by and with the consent of the parties, that either party shall have the right of appealing from the award to the proper Court in that behalf, and may appeal therefrom as he or they may be advised. The arbitrator, in pursuance of power to that effect given him by the order of reference, enlarged the time for making his award until the 10th day of May, 1881, and on the 3rd day of May, 1881, he made his award, and gave notice thereof to the parties on the tenth of the same month. The plaintiff took up the award on the 11th of May, and on the 27th day of August, 1881, gave notice of appeal from the said award, and that such appeal would be heard on the 6th day of September, 1881. The appeal afterwards came on to be heard before Mr. Justice Osler on the 30th of September, 1881, when it was objected that the appeal did not lie. The learned Judge overruled the objection, but it does not appear from the reasons given by him for the conclusion arrived at, whether he considered the objection was only directed against the right of appeal, and was not pointed to the time within which the appeal should be made, which latter point is the one presented by the second of the defendant's reasons of appeal to this Court and was the ground urged upon the argument. The defendants' contention is, that where a verdict is taken subject to arbitration the award must be appealed from within the first four days of the term after the making of the award; or, at all events, if a reference by consent under section 205. R. S. O., ch. 50, is subject to appeal at all, within fourteen days after making or filing of the award, as provided by sub-section 3 of section 191, which governs the practice where the reference is under section 189 of that Act. I should conclude, from the following observations of the learned Judge, that he really was not determining this question: 46 U. C. R. p. 238. "I am of opinion, that as the parties have agreed, by the terms of the submission, that there shall be an appeal, an appeal well lies. R. S. O., ch. 50, sec. 205, provides that in the case of a voluntary reference to arbitration, where it is agreed by

the terms of the submission that there may be an appeal to one of the Superior Courts, this Act shall apply, and an appeal shall lie in the same manner as in the case of a reference under section 189. The latter section is that under which the usual compulsory order of reference is made, and sections 191, 192, and 193, regulate the procedure on an appeal from an award made under such an order. Section 195 provides for a compulsory reference of a cause at *nisi prius*, and sub-section 2 enacts that an appeal shall lie against an award made on such a reference in the same way as if the reference had been under section 189. It was urged that section 205 referred only to submissions out of Court, and did not embrace submissions by consent in a cause, but the language of the section is quite wide enough to include such submissions, and it becomes quite clear that this is its true construction, when the language of the section, as it now stands in the revised Act above quoted, is compared with 39 Vict., ch. 28, sec. 10, from which it was taken. That section instead of saying that an appeal shall lie, &c., as in case of a reference *under section 189*, provided that it should lie, 'as in case of a reference *in causes pending in Court*,' thus clearly contrasting voluntary references out of Court with compulsory references in a cause. The objection to the appeal is therefore overruled, and I proceed to deal with it upon the merits."

There is not the slightest reference in these observations as to the time within which the appeal must be taken, otherwise than by a reference to the clauses of the Act under which the procedure in appeal is indicated. It would thus seem that the learned Judge overlooked the objection, or counsel omitted to bring it to his notice.

I think there is no room to doubt the correctness of the learned Judge's view that where the reference is by consent in a cause at *nisi prius*, and the consent provides that there may be an appeal, the proceedings on such appeal are to be had in the same manner as an appeal when the reference is under section 189. It becomes necessary then to see what are the proceedings and the limit as to time

for taking them when the submission has been under that section. The section itself does not give the procedure. That is to be found in section 191, which provides: "Where an order is made under the 189th section, the Master County Judge, or other Referee to whom the reference is directed, shall proceed therein; and the depositions of the witnesses examined upon such reference shall be taken down in writing, and shall forthwith after the making of the report or certificate, together with the exhibits referred to therein, and the said report or certificate, and upon payment of the fees of such Master, County Judge or Referee, be filed by the said Master, County Judge or Referee, with the officer of the Court with whom the *præcipe* for the said writ was filed, except in the cases mentioned in sub-section 2 of this section. * * (3) Such report or certificate shall, without an order confirming the same, become absolute at the expiration of fourteen days from the filing thereof unless appealed from; but the Court or Judge may, under special circumstances, allow an appeal after the fourteen days."

By this provision an award, report, or certificate becomes final, unless appealed from within fourteen days after filing the same as above indicated, or the time for appealing is extended by the Court or Judge under special circumstances, and an appeal is made within the extended time. The material before the Court does not disclose when the award, depositions, &c., were filed. All that appears is, that the award bears date the 3rd of May, though referred to in the notice of appeal to the Court below as dated the 9th of May, and that on the 31st of August, 1881, the arbitrator wrote to the defendants solicitor that he and the plaintiff's solicitor were notified that the award was ready on the 10th of May; and on the 11th of May the plaintiff's solicitor took up the award. If the arbitrator followed the directions of the statute, the award and depositions of witnesses should have been filed forthwith after the 3rd or 9th of May, whichever may have been the true date of making the award, and the plaintiff

would clearly have been too late on the 31st of August, when he gave his notice of appeal, to have appealed from the award; and unless this Court can assume, or the Court below could so assume, the award and papers were not filed more than fourteen days before the 31st day of August, without that fact being proved, the appeal to the Court below was too late, and there was no jurisdiction in the Court to hear the appeal. It may be that the arbitrator, instead of observing the direction of the statute, delivered the award to the plaintiff, as stated in the arbitrator's letter to the defendants' solicitor of the 31st of August, and that the plaintiff retained the award in his possession without filing it. If this is the true position of the matter it may well be that he should not be allowed to profit by this irregular proceeding, and thus gain an extended time for moving against the award.

What constitutes the true legal measure of damages in cases like the present is a question by no means easy of solution, or free from difficulty, regard being had to the authorities, which are numerous, and not always uniform or reconcilable with each other. The contract must be taken to have been on the defendants' part to carry a cargo of salt for the plaintiff, at seventy-five cents a ton, from the port of Goderich, in the Province of Ontario, to the port of Milwaukee, in the State of Wisconsin, one of the United States of America, within a reasonable time after the 4th of October, 1879, when the bargain was concluded, or within such reasonable time after the 26th of November, 1879, the time when the salt was actually put on board the defendants' vessel, and bill of lading given. The salt, as I understand the evidence, so put on board, was actually carried thereby and delivered to the plaintiff at Milwaukee in the following Spring, but after this action was commenced, at the agreed rate.

The evidence shews that the plaintiff had sold the salt, or some part of it, to one McGeogh, in Milwaukee, at \$5.25 per ton; and that after the close of navigation in that year the price of salt in Milwaukee rose to \$8 per ton. The

plaintiff, about the 26th January following, sent by rail to McGeogh 200 tons in part fulfilment of his contract, on which he paid freight at the rate of \$3.50 per ton, and before the arrival of the 200 tons McGeogh bought 41 tons at \$8 a ton, at which rate he was allowed by the plaintiff for that quantity on a settlement of their accounts. He also allowed McGeogh 50 cents a ton for extra expense of hauling the 200 tons sent by rail from the place of delivery by rail to his yard or warehouse over what the cost or expense of removal from the vessel would have been. The exact quantity of salt put on board the vessel was not ascertained by weighing, but was estimated at 530 tons from the depression of the vessel in the water. The salt delivered in Milwaukee only weighed 486 tons, making an alleged loss or shrinkage of 44 tons.

The plaintiff's claim for damages is in respect of these several items, and for interest on the value of 300 tons detained on board the vessel during the winter, and for the amount of \$30 paid for insurance thereon.

The evidence further disclosed that the defendants, by letter dated the 11th October, 1879, notified the plaintiff that their vessel would not be able to carry the salt: and that the plaintiff insisted that the salt must be carried by the defendants or they would be held responsible in damages. After a good deal of correspondence the defendants sent the vessel and inloaded the salt as above mentioned, but failed to carry it as the vessel was forced to return by stress of weather, and failed to complete the carriage till the following spring, after the commencement of suit.

The evidence also shewed that after the 11th October, 1879, the salt could have been carried by other vessels at the rate of \$1 per ton during the month of October, and in November at \$1.50, but not that a vessel could have been got to carry it after it was inloaded on the defendants' vessel on the 25th November.

The learned arbitrator by his award allowed the plaintiff damages at the rate of twenty-five cents a ton on 486 tons, the quantity actually delivered in Milwaukee; on

the ground, as stated in his reasons for his decision, that after the 11th of October, 1879, the plaintiff could have obtained and refused other vessels which would have carried the salt in October, at \$1 per ton. He treated the defendants' letter of the 11th of October to the plaintiff as a refusal to perform the contract, which entitled the plaintiff then to have brought his action, and the difference between the seventy-five cents, the agreed price of carriage, and the said rate of \$1 would have been the plaintiff's then damage by the defendants' failure to perform their contract.

The learned Judge in the Court below, whose judgment is in question, on the authority of *Ogle v. Earl Vane*, L. R. 3 Q. B. 272, took the view that the negotiations between the parties kept the contract open till the delivery of the salt in November to the defendants' vessel; and so the true measure of damages was not the difference between the agreed cost of carriage and the cost at which the salt might have been carried in the month of October, after the defendants' letter of the eleventh of the month. He allowed the plaintiff the freight by rail on 200 tons at \$5.50 less the agreed rate of seventy-five cents—that is, charged against the defendant for increased freight, \$2.75 per ton, equal to \$550, the difference between the cost of the 41 tons bought by McGeogh, in Milwaukee, at \$8 per ton, and the price at which the plaintiff sold to him, amounting to \$112.75, but by agreement reduced to \$56.37, the purchaser agreeing to assume half the additional cost—the cost of extra hauling, at \$1 per ton \$100; in all, making the plaintiff's damages, after deducting \$171.50, paid into Court, \$584.87, for which he directed judgment to be entered for the plaintiff.

The question presented by the appeal from the judgment is, was the measure of damages adopted by the learned arbitrator wrong, and that by the learned Judge right; or what is the measure properly applicable on the facts disclosed by the case? It appears to me the learned arbitrator selected the proper measure, if right in his con-

clusion that the contract must be taken to have been broken by the letter of the 11th October, 1879, and was not kept open by the subsequent negotiations. The plaintiff, no doubt, might have treated that letter as a breach of the defendants' contract, and at once shipped his salt at the increased charge of \$1, and claimed from the defendants the difference in freight. But was he bound to do so; and if not, on whom should the consequence of the plaintiff's indulgence fall, on himself or the defendants?

In my opinion, the party failing to perform the contract in such a case must be taken to suffer the prejudice, if any there be. The indulgence having been at the defendants' request, it must be assumed it was deemed by them to have been in their interest, and not that of the plaintiff. If by delay the rate of freight had gone down, so that the plaintiff could in November have got his salt carried at fifty, instead of seventy-five cents a ton, he would not have had an action against the defendants for more than nominal damages. It would therefore seem unreasonable that the defendants should not bear the burden as well as reap any benefit that might result from the indulgence they sought in consequence of their breach of contract. I think, therefore, the plaintiff is entitled to such damages as he actually suffered through the defendants' failure to perform their contract to carry the salt within a reasonable time; and if the loss to the plaintiff, as the natural result of such failure, was greater after the 25th November than it would have been if the carriage had taken place before that date, the defendants must make it good.

The learned arbitrator found as a fact, and the learned Judge in the Court below concurred in the finding, that the agreement to carry was subject to the condition that should stress of weather prevent the carriage within a reasonable time the defendants should not be liable for the loss occasioned by the delay consequent thereon, and that the defendants were in fact prevented by such stress of weather from carrying the salt after the 25th November.

This finding is on the issue joined on the defendants'

eighth plea, which is pleaded to the second count of the plaintiff's declaration. This count is based on an alleged contract to carry the goods within a reasonable time after the delivery for the purpose of carriage and breach thereof, while the first count is founded on a contract to inload the salt within a reasonable time and carry the same to Milwaukee, averring the plaintiff's readiness and willingness to deliver the salt, and alleging as a breach that the defendants did not, within such reasonable time, inload the salt and deliver it.

Treating the declaration as thus presenting two distinct causes of action, one for not receiving or inloading the salt, and the other for not carrying it after inloading, and the finding that after the inloading the carriage was prevented within the condition of carriage in that respect by stress of weather as correct, the measure of damages adopted by the arbitrator if plaintiff entitled to more than nominal damages, would, upon authority, appear to be accurate, and that of the learned Judge erroneous, as the finding on the eighth plea would be conclusive against the plaintiff's right to recover on the cause of action in the second count, while it would not excuse the delay in inloading, and the evidence established that by the delay in inloading the rate of vessel freight had increased twenty-five cents a ton.

Dealing with the contract as presented by the second count, as one to carry and deliver the salt within a reasonable time after the 25th November, 1879, and made subject to the condition as to weather permitting, the finding of the arbitrator on the question of fact being supported by evidence and approved by the learned Judge, the appeal from his award should have been dismissed, and consequently this appeal allowed. But assuming this not to be so, and that in law the negotiations between the parties after the 11th October, 1879, had no other effect than to change the period at which the measure of the plaintiff's damages may be found, and it is open to the plaintiff on the first count to recover his entire loss by delay in inload-

ing, and in the final carriage after inloading, it becomes necessary to consider whether the damages allowed by the learned Judge are such as are warranted under the law, in a case like the present.

The rule stated by Mr. Mayne in his work on Damages, 3rd ed., p. 259, is as follows: "Damages against the owner of the ship for not taking a cargo are regulated, on exactly the same principles as those against the freighter for not supplying it, by the amount of damages actually and necessarily incurred. If the freighter could not procure any other ship, the damages would of course be measured by the injury suffered from having his cargo left on his hands; bearing in mind, however, that in all such cases the damages suffered must be such as the contracting parties were led to contemplate. If another ship could be procured, the damages would be measured by the increased rate of freight payable; and if such freight was in fact less than that contracted for, the damages would of course be merely nominal for breach of contract. In all cases, however, the damages must be the necessary and immediate consequences of the breach committed." In support of these positions are cited *Hunter v. Fry*, 2 B. & Ald. 421; *Walton v. Fothergill*, 7 C. & P. 392, and *Hadley v. Baxendale*, 9 Ex. 341. The last is the leading case on the question of the measure of damages, and lays down the rule as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

This rule is simple and plain enough in statement, but a consideration of the authorities since its enunciation will shew it is not quite so clear what damages do come within the first branch, that is, "which may be considered as fairly

and reasonably arising naturally—that is, according to the usual course of things—from the breach of contract itself.” The case of *Smeed v. Foord*, 1 E. & E. 602, in which the measure of damages is much discussed, was decided in 1859, about five years after *Hadley v. Baxendale*, which is approved with some expressions of doubt by some of the Judges, and expressly decides that loss of market is not an item of damages that is recoverable without the contract is made in reference to the market. The head note to that case is as follows: “Defendant contracted to deliver to plaintiff, a farmer, a threshing-machine within three weeks. It was the plaintiff’s practice, known to the defendant, to thresh wheat in the field, and send it thence direct to market. At the end of the three weeks the plaintiff’s wheat was ready in the field for threshing; and on plaintiff’s remonstrating at the delay in the delivery of the machine, the defendant several times assured him it should be sent forthwith. Plaintiff having unsuccessfully tried to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by rain. The machine was afterwards delivered to the plaintiff, who paid the contract price. The wheat was then threshed, and it was found necessary to kiln dry it, owing to its deterioration by the rain. When dried and sent to market it sold for a less price than it would have fetched had it been threshed at the time fixed by the contract for the delivery of the machine, and then sold, the market price of wheat having meanwhile fallen. Held, in an action for the non-delivery of the machine, the plaintiff was entitled to recover substantial damages in respect of the expense of stacking the wheat, of loss arising from its deterioration by the rain, and of the expense of drying it in the kiln, but that he was not entitled to recover any damages in respect of the fall in the market price of wheat.”

Lord Campbell in expressing his opinion after approving of the rule laid down in *Hadley v. Baxendale*, as an

abstract rule of law, said : " Applying it to the facts of the present case, we must hold that the plaintiff is entitled to recover all losses which naturally arose, or which were contemplated by him and the defendant as likely to arise, from the delay in the delivery of the machine. Now the plaintiff, a large farmer, known to the defendant to be such, wanted a machine to thresh his wheat. The defendant agreed to supply him with one on the 14th August, 1856, about the time when wheat would be expected to be ripe. The defendant knew the plaintiff wanted the machine for the purpose of threshing wheat in the field. Then was it not contemplated by the parties that if the machine was not delivered by the time fixed, damage to the wheat would in all probability be the result; particularly in such a variable climate as this? Owing to the non-delivery of the machine, the wheat was stacked, and afterwards damaged by the rain which ensued. This injury, and the loss and expense which it involved, were the natural result of the defendant's delay. They were also results which the parties must have foreseen. * * The plaintiff, therefore, being in no default, I think he is entitled to substantial damages in respect of all those items of loss which resulted from the fall of rain. He is not, however, in my opinion entitled to any damages in respect of the fall in the market price of wheat; for that could not have been in the contemplation of the parties when the contract was made, nor can it be said to have been in any way the natural result of the defendant's breach of contract. For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen."

I have made this long extract from the case of *Smeed v. Foord*, as it, while approving of the rule in *Hadley v. Baxendale*, extends the application of it, and because it deals with the question of loss of market. I must say I have great difficulty in seeing how the rain and consequent injury could be treated as naturally flowing from the failure to deliver the machine. If a fire had destroyed the

grain while stacked, I presume that would have been a damage too remote and not contemplated by the parties but the fire would be just as much the result of the delay as the rain. Neither was the direct result of the delay. The rain might have fallen and damaged the grain while the threshing machine was at work, and it was not the natural consequence of the delay. But it is quite intelligible that the parties contemplated that it might rain, and if it did, wheat in the field would be injured, and the expenditure in drying was an expenditure thus directly resulting from what the parties contemplated would happen. It is the statement of Lord Campbell, "that the injury and the loss and expense which it involved were the natural results of the defendant's delay that I cannot reconcile with my own idea of what is the natural result of an act. I cannot see how the fall of rain more than the fall in the market price of grain was the natural result of a delay in delivering a threshing machine.

In *Wilson v. The Lancashire & Yorkshire R. W. Co.*, 9 C. B. N. S. 632, Mr. Justice Willes, at p. 643, said: "It appears to me that the damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand, and less capable of being applied usefully by the plaintiff, is the ordinary, natural and immediate consequence of delay, for which the carrier is answerable."

In *Baldwin v. The London, Chatham and Dover R. W. Co.*, 9 Q.B. D. 582, it was held the railway company was not liable for delay in carrying rags, which, on account of being packed damp, became heated and were rendered, quite useless. The rags, in the ordinary course of business, should have reached the place to which they were carried in twenty-four hours. They did not, by reason of miscarriage by the railway company, reach till the lapse of two weeks. It appeared that rags packed in a damp state would spoil in a few days (much less than a fortnight). The company had not been notified that the rags were packed in a damp state.

Matthew, J., said: "What were the natural or necessary damages resulting from that delay? If the rags had been dry when delivered to the company, the damage would have been *nil*. The rags, however, were then damp, and hence their destruction." If the rags had been delivered in the usual time—twenty-four hours—they might not have been spoiled. Still the defendants were not held liable, because they had no notice from which they were given to understand they would be liable for anything more than the ordinary consequences of a failure to carry according to their contract. What damages may have been in the contemplation of the parties, is a matter more susceptible of proof than what are the natural damages flowing from the breach of a contract.

But notwithstanding the extensive application of the rule in *Hadley v. Baxendale*, to all kinds of contracts the Courts have formulated other rules as guides. One is laid down in *Hamlin v. The Great Northern Railway*, 26 L. J. N. S. 22, 1 H. & N. 408, in relation to the carriage of passengers, but which would appear equally applicable to the carriage of goods. It is: "If a party does not perform his contract, the other party may, do so for him as near as may be, and charge him for the expense incurred in so doing."

In *Lt. Blanche v. The London and North Western R. W. Co.*, in appeal, 1 C. P. D., Lord Justice Mellish, at p. 313, said, in reference to this rule: "I agree, that as a general rule, what is said by Alderson, B., in *Hamlin v. The Great Northern R. W. Co.*, is correct," but added, "I also agree with what is said by the Judges of the Common Pleas Division, that this rule is not an absolute one applicable to all cases, and that the question must always be, whether what was done was a reasonable thing to do having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in

the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule that what is reasonable under particular circumstances, may be discovered by considering what a prudent person, uninsured, would do under the same circumstances, is applicable to many cases besides those which arise under policies of marine insurance. I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself to if he had no company to look to."

Baggallay, J. A., at p. 323, said: "Mr. Justice Brett, in delivering the judgment of the Court (in the case then in appeal), is reported to have said: 'We think that the rule attributed to Mr. Baron Alderson in *Hamlin v. The Great Northern R. W. Co.*, is a good expression of the law. We think it may properly be said, that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing.'" The difference between the statement of the rule by Mr. Justice Brett and its statement by Mr. Baron Alderson would seem to consist in the introduction of the words *reasonably* and *reasonable* by the former. Baggallay, J. A., adds: "This appears to me to be a more correct enunciation of the principle applicable to such cases than the particular words attributed to Baron Alderson." And again, at p. 325: "The principle enunciated by Baron Alderson in *Hamlin v. Great Northern R. W. Co.* has no application to such a case as that which we are now considering. It has application only to cases in which the act is done and the expense incurred to enable the contract to be performed,

and not to cases in which damages consequential upon the breach are claimed. * * I think the rule suggested by Lord Justice Mellish would prove a safe guide for determining what steps may, with propriety, be taken by a railway passenger for securing the performance, as near as may be, of the contract of carriage entered into with him by a railway company."

Applying the rule thus enunciated to the facts of the present case, would it have been a reasonable and prudent thing for the plaintiff to have engaged a railway to carry the salt at \$3.50 per ton? If we can regard the existence of his contract to deliver the salt to the consignee in Milwaukee at \$5.25, it may possibly in view of his desire to continue his business dealings with the purchaser, McGeogh, and the fact that salt had gone up to \$8 a ton, have been so, but not otherwise. The value of the salt to the plaintiff, under his contract with McGeogh, in Milwaukee, was, as he stated in his evidence, \$2.84, paying freight at seventy-five cents per ton. But the figures he gives do not make it quite so much. The duties he states were \$1.60 per ton, and the freight 75 cents, equal \$2.35, without adding anything for insurance. This, with salt at \$5.25, would make the value to him \$2.80. Then, to have had it carried at a cost of \$3.50, instead of seventy-five cents, or \$2.75 more, would have left him with the salt for the purpose of performing his contract realizing only five cents a ton. In other words, he would have lost the difference between the actual value of his salt and five cents a ton; and the damages he would have had to pay McGeogh would have been just \$2.75, the difference between \$5.25, the contract price, and \$8, the increased market value. But by sending the salt he ran all the risks of transport and loss by accident. It seems to me a prudent man would have retained the salt, which in Goderich was certainly worth more than five cents a ton. It was therefore scarcely a prudent thing for him to have done to have sent the salt forward. But I presume the defendants cannot be affected

by his bargain with the consignee. The contract between the plaintiff and defendants was not made in reference to any such bargain, and the law seems undeniably clear that unless the contract of carriage was made in reference to such bargain, the shipper is not entitled either to the profits that he would have made by the performance of his contract, nor to any damages that he may have had to pay in consequence of its breach. *Borries v. Hutchinson*, 18 C. B. N. S. 445, is an authority for the latter proposition; *The Great Western R. W. Co. v. Redmayne*, L. R. 1 C. P. 329, for the former. *Horne v. Midland R. W. Co.*, L. R. 7 C. P. 583, and in Appeal 8 C. P. 131, is also a clear authority against the allowance of the loss of profit as damages.

The difference in the market value of the goods between the time they should be delivered and their actual delivery, it is said, furnishes a measure of damages where the goods fall in marketable value: *Wilson v. The Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632.

Applying that rule to the present case, there is no evidence to shew what in fact was the difference in the market value between a reasonable time after the 4th October, when the salt should have been delivered, and the time it was delivered in the following spring. The evidence shews that after the contract was entered into, and the time for the arrival of the salt had passed, the market value of the article went up, but its value at the time of its arrival does not appear in evidence. This measure is not applicable therefore on the evidence to the present case, and it appears to me the learned Judge in the Court below was not warranted in allowing the plaintiff the difference in price for the forty-one tons purchased by his consignee in Milwaukee, as to allow that would be a clear infringement of the rule that damages for breach of a sub or collateral contract are not recoverable, unless the contract was made in reference to such sub or collateral contract. Nor do I see how the expense of the hauling,

claimed as being in excess of what it would have been if the two hundred tons delivered by rail had been delivered by water, can properly be allowed. If the defendants had never carried the salt at all what would have been the true measure of damages? Not what the plaintiff paid in satisfaction or settlement of his contract with his consignee in Milwaukee, because the bargain was not made between him and the defendants in reference thereto; not the increased value of the salt in Milwaukee, because that did not depreciate the value of the salt which remained in the plaintiff's possession. The increased value in Milwaukee was a matter that arose after the breach of the contract, and not a consequence of the breach; the delay therefore enhanced the value of the salt. We cannot assume that the plaintiff would have retained the salt till the price did go up, any more than we can regard the fact that he had made a contract which he was unable to perform, and had to pay damages for the breach of it.

Though the case, in many of its circumstances, resembles that of *Ogle v. The Earl of Vane*, L. R. 3 Q. B. 272, it differs in this material respect. That was an action by the purchaser against the seller of a quantity of iron, in which, after the time of delivery had passed, the seller wished the purchaser to wait, to give him an opportunity to repair the furnace, and not purchase against the contract. The buyer did wait for several months, and after notice that he could wait no longer bought the iron, and paid a higher price for it than was the market price at the time the contract was broken. The jury allowed the plaintiff the difference between the contract price and the price paid for the iron. The Court refused to disturb this verdict, holding that the negotiations between the parties could be considered by the jury in determining the damages, and that they were not, as matter of law, bound to take the market value of iron at the time the contract was broken as determining the measure of the plaintiff's damages. In this case the contract was performed by the defendants, but not within

a reasonable time, and the plaintiff therefore cannot claim other damages than these occasioned by the mere delay. In that the contract was not performed at all. *Smeed v. Foord*, 1 E. & E. 602, is rather against than in favour of the plaintiff, as it was there held that a breach of contract to deliver a threshing machine, whereby the plaintiff's grain which was on the field, was injured, and the market value of grain fell, did not entitle the plaintiff to recover, as part of his damages, the diminished value of the grain in the market.

It appears to me that the general and ordinary measure of damages against a carrier who fails to perform his contract of carriage is the cost of having the goods carried by some other and ordinary or reasonable means of conveyance, and if such reasonable or ordinary means of conveyance entails a greater expense than the contract rate of carriage, the carrier must make it good. Then, in the present case, treating the plaintiff as he must be treated, as if his only object in entering into the contract was to get his salt to Milwaukee, where it would be worth to him only \$2.84, after paying seventy-five cents' freight, would it be the act of a prudent man, having no one to look to for compensation, to pay \$3.50 to get it there? If not, he was not justified in resorting to the rail at that rate as a means of carriage, and thereby impose that burden on the defendant, and the increased rate of carriage does not become, as against the defendants, the proper measure of the plaintiff's damage, according to the decision in *LaBlanche v. London and North Western R. W. Co.*, which is approved in *Miller v. Brash*, 8 Q. B. D. 35, where it was held, where a carrier had mislaid a trunk, the owner was entitled to buy at the place of destination other articles of wearing apparel to replace those in the trunk, and to recover from the carrier the enhanced price paid for them. *Baldwin and Co. v. London, Chatham, and Dover R. W. Co.*, 9 Q. B. D. 582, is against the plaintiff's right to recover more than what the arbitrator has allowed.

If the salt had gone down in its marketable value, so as to be of less value to the plaintiff at Goderich or Milwaukee than it would have been at any time between the 11th October and the delivery, in Milwaukee in the Spring, the difference in the two values would be the loss caused by the breach of contract. The defendants themselves have fixed the rate of twenty-five cents a ton as the amount the plaintiff has been damaged by their breach of contract, and the learned arbitrator, on the facts, has adopted this measure, which is not an illiberal one to the plaintiff in my view of the law. I am of opinion the appeal from his decision should have been dismissed, and the present appeal should therefore be allowed. It must not be overlooked that the salt sent by rail was not salt delivered to the defendants' vessel, but other and different salt; and so that the defendants have in fact carried the quantity of salt they agreed to carry, and received for carriage, at the agreed price; and to hold them responsible for the freight on the two hundred tons sent by rail is in effect to have made them carriers of that additional quantity at their expense, though they had not undertaken to carry more than the 530 tons. I think, owing to the fact that there was no proper evidence of the quantity of salt put on board the *Erie Belle*, the arbitrator and learned Judge were right in their conclusion that no damages could be allowed for the alleged deficiency in quantity. Salt is an article the weight of which may be very materially affected by the condition of the atmosphere. It will absorb very considerable moisture, and have its weight materially affected in wet or damp weather. Moreover, it is to be observed, the plaintiff, in his declaration, charges the quantity contracted to be carried was five hundred tons, though the bill of lading states it to have been five hundred and thirty, which was only an estimate made from the degree of depression of the vessel in the water, and not from actual weighing. The salt might have been carried in November for \$1.50 per ton, which, assuming the whole five hundred tons had

been carried, instead of the two hundred tons, would make the plaintiff's claim \$875 less the sum paid into Court. But I do not understand that the law permits a freighter to charge against a shipowner who has broken his contract of carriage any higher rate of freight than may rule after such breach, unless he has in fact paid such higher rate. If it did, he might recover a considerable sum, though he had not sustained damages to the value of a cent, as his goods might remain undeteriorated in value where the market price remained unchanged. And it certainly could not be said when the market value went up it was in the contemplation of the parties that such rise in the market should determine the damages consequent upon the breach of contract to carry; much less could it be said that such rise was the natural result of such breach.

If the salt had been lost, *O'Hanlan v. Great Western R. W. Co.*, 6 B. & S. 484, would clearly authorize the allowing to the plaintiff of the value of the salt at the time it should have arrived if the contract had been performed; and such value would not be determined by the value at market of purchase, with the cost of carriage added, but by the value ruling in the market of the place of delivery; and if there was no market, then by adding to those two items a reasonable importation profit. But in such a case the carrier would become the owner of the goods, as his liability would be in effect for the conversion of the goods, and the rule is quite inapplicable where the goods are in fact carried. In the case of a sale of goods, the seller contracts with reference to their value at the time of delivery, and therefore is reasonably held to be liable to make good what the buyer has to pay to put himself in the position he would have been in if the contract had been performed. The carrier who contracts to carry goods does not do so with reference to their value at the agreed time of delivery. Nor does he, except in such cases as pointed out by Lord Justice Mellish, in the case of *The Parana*, 2 Pro. D. 118, undertake with regard to any particular market.

The cases mentioned by the learned Judge were, where beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, or goods are sent for the purpose of being sold in a particular season when they are sold at higher prices than at other times, or if it be known to both parties that the goods will sell at a better price if they arrive at one time than another, the loss by a fall in the market, or, in other words, the loss of the value of the goods in the particular market, may be recovered.

Apart from the fact that the plaintiff had a contract for the supply of salt in Milwaukee, he would have lost nothing by paying the increased freight, as he would have recovered the difference in the freight in the enhanced market value of the article. That is, salt would have been as valuable to him when delivered as it was at the time the contract of carriage was entered into; and it is only on the ground that he is entitled to the profit he would have made from the rise in the market, or loss of market, that he would be entitled, as far as actual damage is concerned, to recover more than the arbitrator allowed him.

I have not found any case like the present, where for mere delay in carriage the loss of market has been allowed as damages, outside of the class of cases mentioned by Lord Justice Mellish.

If the true measure of damages is the difference between the price of salt at the time it should have arrived, say ten days after the 4th of October, and the price during the winter, the plaintiff has not recovered enough, as he would be entitled to the difference between \$5.25 per ton and \$8 on five hundred tons, which would amount to \$1,375, and this Court, as the law of appeal now stands, ought to award it to him if that be his legal right. It was open to the arbitrator to assess the damages upon the evidence to the best of his judgment, and his award is entitled to equal consideration with the finding of a jury; and had a jury in this case found as he has done, the finding would

not have been disturbed, and I think it ought not to have been in the present case.

Appeal dismissed, with costs, CAMERON, J., dissenting.

CHAMBERLEN V. CLARK.

Administration—Deficiency—Liability of creditors to refund.

The effect of Sect. 30 R. S. O. ch. 107, is to disable an executor from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if upon a final adjustment of the accounts of the estate it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of other creditors, the Statute thus placing creditors and legatees in this respect upon the same footing.

Chamberlen v. Clark, 1 O. R. 135, affirmed.

This was an appeal by the defendants from the Chancery Division. The judgment is reported 1 O. R. 135, where the facts are clearly stated. The order drawn up on that judgment was as follows :

"This Court doth declare that the respondents are liable to recoup to the estate in question herein such sums, if any, as may be requisite, in order make the amounts received by them respectively as creditors of the said estate, proportionately equal to the amounts which the plaintiff and the other creditors who have proved claims herein would be entitled to receive upon a ratable distribution of the assets of the said estate among all the creditors, and doth order the same accordingly. And this Court doth order that it be referred to the Master of the Supreme Court of Judicature for Ontario, at Peterborough, to ascertain and state the amount of the deficiency, if any, of the assets of the said estate, and what amounts, if any, have been paid to any of the respondents over and above the amounts to which they would respectively have been entitled upon a ratable distribution of the assets of the said estate among all the creditors. And this Court doth further order that the respondents respectively do refund and pay into Court to the credit of this cause the excess, if any, which they have received over and above the shares which the said Master may find that they would have been entitled to receive upon a ratable distribution of assets of said estate among all the creditors. And this Court doth reserve the consideration of the question of costs until after the said Master shall have made his report."

The reasons of appeal were as follow :

"The appellants having been paid by the executors, and having received payment in good faith, are entitled to hold the amounts received by them, notwithstanding that it subsequently appears that there is a deficiency.

"Such deficiency is occasioned altogether by the plaintiff's claim herein, and there is no equity which ought to be enforced in his favour under the circumstances.

"An executor is justified in making payment to creditors up to the time that proceedings to administer the estate are taken. *A fortiori* a creditor, receiving payment before administration proceedings taken, should be entitled to hold the same without account as against other creditors.

"Such creditors should not be deprived of the fruits of their superior diligence, and the only remedy, if any, which the other creditors should have is against the executors who made the payments.

"In the present case the payments made by the executors have been allowed by the Master as payments properly made by them, and there has been no appeal from his report in this respect, and therefore the plaintiff cannot, now be heard to assert that these payments were improperly made.

"If the principle affirmed by the order be correct, then no creditor of a deceased debtor can safely accept payment of his debt from the personal representative without first taking steps to administer the estate of the deceased, in order to ascertain whether it will pay all creditors in full, or take the risk of being called upon, perhaps after the lapse of twenty years, to refund a part of that which he had received. It is submitted that such a rule would be productive of great hardship, and lead to very inconvenient results; *Doner v. Ross*, 19 Gr. 229; *Hilliard v. Fulford*, 4 Ch. D. 389; *In re Radcliff*, 7 Ch. D. 733."

The grounds alleged in support of the judgment appealed from were as follow :

"The executors are insolvents, and any remedy against them would be ineffectual.

"All the creditors in question are entitled to be paid *pari passu*; had the assets of the estate been so administered, the present appellants would not have received the amounts paid them; it is no hardship on them having to refund what they improperly received.

"The executors would have the right to compel these creditors to refund if they paid the respondents, and the executors being insolvent, the present respondents are entitled to a direct remedy against the appellants.

"The respondents, Robert Dinwoodie and Adam Dinwoodie, were paid their claims by a conveyance to them of certain lands, portion of the estate of the said testator; and in any event, said respondents, Robert Dinwoodie and Adam Dinwoodie are liable to refund the excess in value received; *Bank of British North America v. Mallory*, 17 Gr. 102; *Taylor v. Brodie*, 21 Gr. 607; *Doner v. Ross*, 19 Gr. 229."

The appeal came on to be heard before this Court on the 7th September, 1883. *

Moss, Q. C., for the appellants.

S. H. Blake, Q. C., for the respondent.

The authorities cited are mentioned in the Court below.

December 12, 1883. SPRAGGE, C. J. O.—I continue of the opinion that I expressed in the *Bank of British North America v. Mallory*, 17 Gr. 102, as to the effect of the Stat. 29 Vict., c. 28, that it abolishes the distinction between the different classes of debts therein enumerated; making all payable *pari passu*; and disabling an executor from giving preference to one creditor over another; and it would follow that paying one creditor in full would be, as a general rule, an admission that he had assets sufficient to pay all creditors.

The plaintiff's contention is, that he, being an unsatisfied creditor, stands upon the same footing as between himself and satisfied creditors as does an unsatisfied legatee, as between himself and a satisfied legatee; and is entitled to the like remedies, the remedy in such case being that assuming his remedy to be primarily against the executor, he is entitled, where he is in a position to compel payment of his legacy from the executor, to compel payment or contribution from other legatees.

**Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

The estate of which he is a creditor being insolvent, and the executors also being insolvent, and certain creditors of the estate other than himself having been paid in full, the plaintiff asks that those creditors be ordered to refund *pro rata*, so that he may receive for his debt a ratable proportion with the other creditors.

There would, as between ordinary pecuniary legatees, be such a direct remedy as is sought by the plaintiff, unless the deficiency in the estate had been occasioned by its having been wasted by the executors, and that is not alleged in this case.

It is clear that creditors have, if they choose to exercise it, a direct remedy against legatees who have been paid by executors. The direct remedy between legatees rested in part upon the authority of Sir Joseph Jekyll in an anonymous case in 1 P. Wms. 495. The rule is thus stated in *Williamson Executors*, 8th ed., 1458: "If the assets were not originally sufficient to pay all the legacies, and one legatee receives his legacy in full, in that case the unsatisfied legatees may compel the one so paid to refund." And this seems to be now the admitted rule as between legatees. In Sir Joseph Jekyll's judgment he gives the rule as "in imitation of the spiritual creditor, where a legatee recovering his legacy is made to give security to refund in proportion if," etc., a reason that does not apply to the like relative position between creditors. In an earlier case however, *Noel v. Robinson*, 1 Vern. 94, Lord Nottingham is reported to have said: "But in this Court, though there be no provision made for refunding, yet the common justice of this Court will compel a legatee to refund. It is certain that a creditor shall compel the legatee to refund; and so shall one legatee compel the other, where the assets become deficient." In the report of the same case in 2 Vent. 358, the reason given for the decision, apart from the question of the executor's assent to a legacy is, the assets being deficient, that "a legatee shall refund against creditors (if there be not assets) and against legatees; all which are to have their proportion where the assets fall short."

I think, however, that the fact of a creditor being entitled to compel a *legatee* to refund, and the ground of his being so entitled, may throw some light upon the question whether he is entitled to call upon another creditor to refund.

The language of Mr. Justice Buller, in *Farr v. Newman*, 4 T. R. 637; and that of Lord Hardwicke, in *Nugent v. Gifford*, 1 Atk. 463, state the position of the funds of an estate in the hands of an executor, and the position of the executor, in a way that seems at first adverse to the right of the unsatisfied creditor to call upon the satisfied creditor to refund. The language of Buller, J., is: "At law there is no such thing as a *fund* in the hands of the executor, being the *debtor*; but the person of the executor in respect of the assets which he has in his hands is the debtor." But it is evident from the context that he was speaking only of the legal aspect of the case as distinguished from its equitable aspect; for he speaks of a Court of law being "unable to administer the same relief which equity does." The question in the case was, whether the testator's goods were exigible at law for the debts of the executor. The language of Lord Hardwicke, as reported in *Atkyns* is: "At law the executor has power to alien and dispose of the assets of the testator, and when they are aliened no creditor by law can follow them, for the demand of a creditor is only a personal demand against the executor, in respect of the assets come to his hands; but no lien on the assets." He adds, however, "this Court will indeed follow assets upon voluntary alienations by collusion of the executors."

In the case of *March v. Russell*, 3 M. & C. 31, Lord Cottenham referred to the previous cases on the subject of legatees being compelled to refund; and he stated the position of a creditor differently from the statement of it in the passages I have quoted from the judgments of Buller, J., and Lord Hardwicke. He styles assets in the hands of an executor, the fund of the creditor; his language is: "The question here is, whether the creditor shall not be entitled to follow the assets, which are his fund (the debts not hav-

ing been paid) in the hands of persons who have not purchased them, but to whom they have been delivered in mistake."

To my mind it makes no practical difference by what name the interest of the creditor in the assets in the hands of the executor may be called ; whether the assets are the fund of the creditor in the hands of the executor, or whether the creditor has or has not technically a lien upon them, for payment of his debt, it is certain that his debt, besides giving him a personal demand against the executor gave him such an interest in the assets as entitled him to follow them into the hands of those whose right was only secondary to his. Without this he could not follow the assets at all. It is this interest, by whatever name called, that enables him to follow them into the hands of a legatee, He cannot follow assets into the hands of a purchaser for value, because he cannot shew as against such purchaser a superior title, but where he can shew superior title he can follow them. The case of legatees, and of those who have obtained assets by collusion with the executor, are instances of this.

If it be said that the title of an unsatisfied creditor is not a better title than that of a satisfied creditor the answer is, that for so much of the assets as he has received beyond what he was entitled to receive, having regard to the amount of assets distributable and the claims of other creditors upon the same assets, the title of the unsatisfied creditor is better than his ; and it is, I apprehend, upon this principle that an unsatisfied legatee is allowed to call upon a satisfied legatee to refund.

Mr. Lewin, in his book on Trusts, 6th ed. 198, has given us his idea of the nature and character of assets, thus: "Assets in the hands of an executor are regarded as a species of trust property, even by the common law ; which in respect of them has engrafted upon itself a quasi equitable jurisdiction" and the learned writer proceeds to give instances of this which lead him to the conclusion that he has adopted.

It can make no difference in principle that contribution

or refunding cannot be called for, where the executor has voluntarily paid a legatee more than his due proportion of his legacy, until it be shewn that the executor himself is insolvent. That appears to be the rule, for which the following cases may be referred to: *Hodges v. Waddington*, 2 Vent. 360; *Moore v. Moore*, 2 Ves. 596; *Orr v. Kaines*, 2 Ves. 194. The rule is a harsh one making the executor liable to pay rather than making the overpaid legatee refund, and there may be exceptions to it. In the case before us it is a fact in the case that the executors are insolvent.

The position then of the parties is this: The petitioner, the plaintiff, is an unsatisfied creditor; the defendants against whom he seeks relief, have received payment of their debts in full. The fund out of which they have been paid ought, under the statute, to have been distributed ratably among the creditors. To the extent to which the satisfied creditors have been paid more than their due proportion the fund has been misapplied; and to that extent the petitioner has received less of that fund than he is entitled to. The executors being insolvent that which he is entitled to cannot be made good from that quarter. One would say, to paraphrase the language of Lord Nottingham, "The common justice of the Court will compel the satisfied creditors to refund." If they are not compelled to refund the petitioner will, through no fault of his, lose a portion of the estate to which he is entitled, while the satisfied creditors will retain out of the same estate that to which they are not entitled, and thus the manifest object of the statute will be frustrated.

In two cases reported, in 8 Sim. *Wilson v. Paul*, p. 63, and *Mitchelson v. Piper*, p. 64. Sir Launcelot Shadwell dealt with the assets of an estate between creditors so as to place upon the same footing those who had been paid in part by the executor, and those whose debts were wholly unpaid. He said, "As it is one of the leading maxims of this Court that equality is equity, the creditors who have been paid in part ought not to receive any further part,

either of the legal, or of the equitable assets, until the other creditors have been paid the same proportion of their debts."

The maxim invoked by the learned Vice Chancellor is the same upon which our Statute proceeds.

I do not think that we *need* as a precedent the rule which prevails as between unsatisfied and satisfied legatees. I think we have enough without it. At the same time I must observe that every reason and principle upon which that rule is founded does, as it appears to me, apply with as much force to the case of unsatisfied creditors calling upon satisfied creditors to refund *pro tanto*.

The argument *ab inconvenienti* is pressed upon us. The having to refund is sometimes felt as a hardship and sometimes with reason, and as much perhaps in the case of legatees as of creditors. In the case of *March v. Russell*, to which I have referred for another purpose, the obligation to refund operated with great hardship upon the representatives of a trustee who had only *concurred* in a breach of trust, committed by his co-trustee; but that circumstance did not stand in the way of the right of creditors. Generally, there would be but little delay in adjusting the rights of all parties, and the Court could always in a proper case refuse to give interest. I think the reasons in favour of refunding—the absolute justice of requiring a party who has received more than his due to restore it to the party who has received less than his due—to make between them that equality which is equity—entirely outweigh the considerations which have been addressed to us on the score of inconvenience and occasional hardship.

In my opinion the appeal should be dismissed.

BURTON, J. A.—I asked during the argument if Counsel could refer to any case under the old law where a creditor had been compelled to refund when debts had not been paid according to their legal priority, and was informed that they were unable to find any such case.

The reason is probably that the only ground on which the executor could demand the repayment would have

been a good defence originally, and not having then set it up he had disentitled himself to recover. If he had notice of the debt of a superior degree when he chose to pay an inferior debt, he paid it with his eyes open, and assumed the consequences. If, on the other hand, he had no notice of the debt of a higher nature at the time he made the payment, he was protected.

So that it would seem that no action would have been sustainable by the executor to recover back a sum paid to a creditor.

If a sum had been paid to a person claiming falsely to be a creditor, or if a sum of money supposed to be an asset had been distributed among the creditors, but was discovered afterwards not to be an asset of the estate the money might be recovered as having been paid under a mistake of fact.

As regards legacies, the executor could always recover back a legacy he had paid in full if it should afterwards appear that there was a deficiency of assets, and that whether the payment was made voluntarily or after judgment or decree.

It appears to me that now, when by Statute all debts are to be paid *pari passu*, the same principle must apply as was formerly held to be applicable to legacies.

The executors at the time they paid the claims of the creditors might well have assumed that the mortgagee would never rank as a creditor upon the estate, but that the mortgaged premises would be sufficient to satisfy his demand; they acted apparently in good faith in making the payment of claims, to which they had no valid defence at the time; but it appearing from facts which have since arisen, that there were not sufficient assets to pay all the creditors in full, I think the executors would be entitled to recover back the excess, as money paid under a mistake of fact. The amount never having been legally due, the creditors hold it without consideration, and would be bound to repay it to the executors; and the executors being shewn to be insolvent, there seems to be authority in the cases of

legatees for the creditor having a remedy direct, which for the reasons I have stated should I think equally apply against a creditor who has been over paid.

I think therefore that the appeal fails, and should be dismissed, with costs.

PATTERSON and MORRISON, JJ. A., concurred.

Appeal dismissed, with costs.

MONTEITH V. THE MERCHANTS DESPATCH AND TRANSPORTATION COMPANY.

Carriers—Fall of markets—Neglect to deliver goods—Measure of damages.

The plaintiff, a dealer in grains, &c., in Canada, consigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford, in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the sea-board the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose who, on payment of the additional freight, granted a fresh bill of lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the necessary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that instead of being delivered in London on the 12th February, it did not reach there until the 23rd of March, too late for the sowing trade, so that the seed had to be sold at a heavy loss.

Held [affirming the judgment of the Court below, 1 O. R. 47]. (1) That the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the defendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London.

Seemle, that the same rule applies where the goods are not intended for immediate sale at their place of destination.

THIS was an appeal from a judgment of the Queen's Bench Division, reported 1 O. R. 47, where the facts

giving rise to the action and the points in issue are clearly stated, and came on to be heard before this Court on the 14th of March, 1883. (*)

McCarthy, Q.C., and *C. Millar*, for the appellants. It is shewn by the evidence in the cause that the clover seed, the subject of the present litigation, was placed in the hands of the defendants for the purpose of being carried by them from Waterford, Ontario, to the City of Liverpool, England, not London, and the subsequent change of its destination was effected or attempted to be effected by Barr, an agent of the defendants in Toronto. The evidence, however, fails to establish that Barr, as such agent, had authority so to change the destination of the goods, or to vary or alter in any way the terms of the bill of lading that had been granted by the agent at Waterford, and it cannot be alleged that there was any implied authority for him to do so, in such a manner as to bind the defendants.

However, if the defendants are bound by the altered or substituted bill of lading issued by their Toronto agent, there is sufficient shewn in the evidence to prove that the plaintiff's own neglect was such as to prevent the destination of the goods being changed until they had arrived at Liverpool. Admitting, however, that the defendants were bound to make good to the plaintiff the loss sustained by reason of the non-delivery of the seed, it is insisted that the amount given by the judgment in favour of the plaintiff is greatly in excess of what he is entitled to recover from the defendants, and should now be reduced to a proper amount accordingly. Looking at the grounds stated in the judgment of Mr. Justice Cameron, the dissenting Judge in the Court below, it would not be unreasonable to urge that the judgment ought to be set aside entirely; in any event the amount should be reduced to the sum stated by the learned Judge: *Ash-*

(*) *Present.*—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

ley v. Harrison, 1 Esp. 48; *Welsh v. Hicks*, 6 Cowen, 504; *Wibert v. New York and Erie R. Co.*, 19 Barb. 36; *Jones v. New York and Erie R. R. Co.*, 29 Barb. 633; *Briggs v. New York Central R. R. Co.*, 28 Barb. 515. *Lane v. Montreal Telegraph Co.*, 7 C. P. 23; *Gee v. Lancashire and Yorkshire R. R. Co.*, 6 H. & N. 211; *Parsons v. Hardy*, 14 Wend. 215.

MacGregor, for the repondents. The evidence given on the trial amply sustains the finding of the learned Judge that Barr, the agent of the company at Toronto, acted within the scope of his authority in granting the new bill of lading whereby the destination of the goods in this case was changed. This ruling, as also that of the Court below being upon a matter of fact, will not be disturbed by this Court. Not only so, but the letters written by the defendants and their conduct subsequently to such change ratified Barr's act, and they are therefore answerable for the damage sustained by the plaintiff in consequence of the non-fulfilment of the contract. The evidence shews distinctly that the sole cause of the damage to the plaintiff arose from the neglect of the defendants' agent at Black Rock in bonding the goods erroneously to Liverpool instead of to London. The plaintiff was not in any degree answerable for such mistake, and the defendants must be held responsible for all loss occasioned thereby: *Hales v. The London and North Western R. R. Co.*, 4 B. & S. 66; *Collard v. South Eastern R. R. Co.*, 7 H. & N. 79; *Borries v. Hutchinson*, 18 C. B. N. S. 445; *Simmons v. South Eastern R. R. Co.*, 7 Jur. N. S. 849; *Ingledeu v. Northern R. R. Co.*, 7 Gray 86; *Leonard v. N. Y. & C. Telegraph Co.*, 41 N. Y. 544; *Sedgwick on Damages*, 4th ed., 401, and cases there cited.

January 25th, 1884. SPRAGGE, C. J. O.—The action is by the owner and shipper of 170 bags or 26,774 lbs. of clover seed, against the defendants, who are, as their name imports, carriers, and is for negligence. The contract was for the carriage of the goods from a place called Waterford

in the County of Norfolk, in the Province of Ontario, to a port in England. They were first shipped for the port of Liverpool, and the defendants' agent at Waterford on the 21st of January, 1880, delivered to the plaintiff bills of lading of that date for the carriage of the goods to Liverpool. Subsequently their destination was changed at the instance of the plaintiff, from the port of Liverpool to the port of London, at an increased rate of freight. This was done through another agent of the defendants, a Mr. Barr, who was their agent in Toronto, and who, after ascertaining that the goods had not gone too far on their way to New York, (the place of shipment for the ocean voyage) for the change to be effected, granted fresh bills of lading, which were in form identical with the original bills, except in the particulars of place of destination, dates, and rate of freight.

The defendants employed one line of steamships for the carriage of goods to Liverpool—the Inman line; and another line—the Anchor line, for the carriage of goods to London. Barr promptly informed the defendants' agent at Black Rock, the first point on the frontier of the United States to be reached by the goods en route, of the change; and gave the like information to their general foreign freight agent at New York. The agent at Black Rock intended to make a necessary alteration in a paper by which, as I understand, the goods were bonded, so as to pass duty free through United States territory. This paper stated the destination of the goods to be Liverpool; he intended to change the destination from Liverpool to London in accordance with the new bills of lading, but through inadvertence and mistake left the destination "Liverpool" as it was in the former bill of lading. The consequence of this was, that the goods went by the wrong line of steamers, and were carried to Liverpool instead of to London. If the seed had been shipped in due course by the Anchor line it would have arrived in London on the 12th of February. It did in fact reach the other port, Liverpool, on the 9th of February, but it did not reach the port of London until the 23rd of March.

I have stated the facts very shortly. They are stated at much greater length in the report of the case in the 1st volume of the Ontario Reports.

The first question raised in the Court below and at the hearing in this Court, has been in regard to the authority of the defendants' agents to make the change that was made in the destination of the goods. That point has been fully discussed in the judgment of the learned Judge who tried the issue, and in the judgment of Mr. Justice Cameron, the dissenting Judge in the Divisional Court, agreeing on that point with the other Judges of that Court and with Mr. Justice Osler. I entirely concur with the judgments that have been given upon that point; and do not feel that I can usefully add anything to them.

The principal question is, as to the proper measure of damages. The majority of the Queen's Bench Divisional Court was of opinion that the plaintiff was entitled to recover for the difference in the marketable value of the goods at the date at which they ought to have been delivered, and their marketable value at the date at which they were delivered. Mr. Justice Cameron held that they were not entitled to such difference in value.

Mr. Justice Cameron bases his decision in a great measure upon the judgment of the Court of Appeal in the case of *The Parana* 2 Prob. Div. 118. That was the case of a long sea voyage, which, according to the plaintiff's own contention, should have taken from sixty-five to seventy days, but which, owing to the defective condition of the vessel did in fact take 127 days. The case is treated by Lord Justice Mellish as distinguishable from the ordinary case of carriers on land; and the Lord Justice observes upon several points of difference; among others that goods imported by sea may be, and are every day sold while still at sea, so that there can be no inference that they are shipped for sale at their point of destination. I think Mr. Justice Cameron himself supplies the answer to the distinction which he takes, when he says "It may well be that the same rules of law that were applicable at the time when it

took sailing vessels from one to three months to make a voyage between Quebec and Liverpool or London would not do justice now, when with very great certainty by steam vessels the voyage is made in ten days."

Upon the general question I must say with great deference to the learned Judge, that the cases which he has so fully and elaborately reviewed, ought in my humble judgment to have led him to a different conclusion from that at which he has arrived. For instance, he quotes from the judgment of Lord Chief Justice Cockburn in *Simpson v. The London and North Western R. W. Co.* 1 Q. B. D. 277, this passage: "The law as it is found in the reported cases has fluctuated, but the principle is now settled, that whenever the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object." Here the thing to be conveyed was clover seed, and this was known to the defendants' agent, for it was so described in the bills of lading. Its being what it was, and the quantity being so large as it was, 26,774 lbs., and being sent from Canada to England, it was reasonably to be inferred that the object of sending it was its sale in England. Then, to quote from another of the cases referred to by Mr. Justice Cameron, *Wilson v. The Lancashire and Yorkshire R. W. Co.* 9 C. B. N. S. 641, we have this from the mouth of Mr. Justice Williams; after expressing the opinion that the plaintiff was not entitled to certain profits claimed by him, he says: "Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him, if they had been delivered in proper time and their value at the time they were delivered. I am of opinion that the consignee is entitled to recover such difference in value." I refer, without repeating it, to the language of Byles and Willes, JJ., in the same case quoted by Mr. Justice Cameron at p. 63 of the report of this case.

The case of *Horne v. The Midland R. W. Co.*, L. R. 7 C. P. 583, in App. 8 C. P. 131. is not against the general rule for while the special damages claimed for loss of profit upon a contract were denied to the plaintiff, the rule as to the measure of damages was, as Mr. Justice Cameron himself puts it, "nevertheless assumed to be the difference between the market price at the time of actual delivery, and the time at which delivery should have been made."

The learned Judge says: "I can fully realize the force of the reasoning with reference to the depreciation in the quality of the thing carried where the delay acts as a deterioration of the thing itself; but I do not see how the thing itself is hurt or improved by a fall or rise in the market; that is a matter depending upon circumstances over which neither the shipper nor the carrier has any control. The delay instead of being prejudicial might be highly beneficial; as for instance where the price has gone up." I confess that I am unable to perceive the difference to the shipper, where his loss is through the negligence of the carrier, whether the loss is in the shape of a deterioration in the quality of the article carried occasioned by the delay, or a loss by a fall in the market value. It is true that the thing itself is neither hurt nor improved by a fall or rise in the market, but the pocket of the shipper is affected by such rise or fall. To start with, there must be negligence on the part of the carrier, and a loss to the shipper occasioned thereby. Why should he not be entitled to compensation for his loss occasioned by that negligence if it take one shape as well as if it take the other. To admit it in the one case and deny it in the other would be making a merely arbitrary distinction not warranted as I think in reason, nor by any authority that I have seen.

The case of *Collard v. The North Eastern R. W. Co.*, 7 H. & N. 79, not referred to in the judgment of Mr. Justice Cameron, affords the best answer to the reasoning of that part of his judgment. It was argued that the article carried, hops, might have been intended for the plaintiff's own use, and in that case they would have been of as much

value to him as if there had been no fluctuation in their market value. There was delay in their delivery, and there was a fall in the market; and they were also delivered in a partly damaged condition through exposure to damp; and the question was, whether the carriers were liable to pay as well for the loss arising from the fall in the market, as for the depreciation in value caused by the actual damage to part of the hops; and it was held that they were liable on both accounts. Baron Martin said: "It seems to me that the case is clear. We must assume that the hops were to be delivered in London on a certain day; and that by reason of the defendants' breach of duty they could not be delivered until another day. It was proved that if they had been brought to market on the proper day they would have fetched a certain price; but not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of £65. If that be not a direct, immediate, and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be." Baron Channell, in concluding his judgment, said: "It must be ascertained what they (the hops) were worth at the time they became available to the plaintiff as marketable goods, contrasted with what they would have been worth if the defendants had performed their contract. I do not know what other test can be applied for ascertaining the damage." Chief Baron Pollock concurred in opinion—it was so stated at his request by Baron Martin—with the other members of the Court.

The case I have last quoted stands clear of the special circumstances which existed in some other cases, where goods were of a particular value at a particular season. As put in Mr. Mayne's *Treatise on Damages*, the fall was what might be termed accidental, and in no way arising from the nature of the article. In the case before us the sowing trade, as it is called, for clover was over by the end of April, it was therefore of importance to the plaintiff to

have his seed arrive in good time so as to take advantage of the market.

Davis v. Garrett, 6 Bing. 716, may also be referred to. It was a case of deviation in a voyage. It was urged that the loss, which in that case was total, might have occurred if there had been no deviation, but that was held to be no answer to the action; and Tindal, C. J., put a case resembling this in its circumstances: "The same answer," he said, "might be attempted to an action against a defendant who had by mistake forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable."

I have referred to a few of the many English cases upon the point in question. In some of the English cases the learned Judges in giving their view of the law have given it as their opinion that it must appear that the sender of the goods intended them for immediate sale at the place of their destination, but I do not think that in any case, damages were disallowed on the ground that the intention was not shewn. The case of *The Parana* comes nearest to it, but there were in that case other elements of consideration; and mercantile usage to sell goods before arrival was one of the leading grounds of decision. We have no evidence of such mercantile usage in Canada; and from the course of trade between Canada and England and the shortness of the period of transit, we have no reason to look for such mercantile usage. I can myself see no good reason for a carrier being exempt from making compensation for loss occasioned by his negligence, where the sender of goods — take for instance what was sent in this case, clover seed — has not determined to sell the article sent, immediately upon its arrival, but, knowing that the market is a fluctuating one, depending upon the law of supply and demand, and is a market of short duration, deliberately and advisedly sends his goods across the ocean to sell, either immediately or at a future time according as he may find the market. This appears to be the view of the law taken, after some fluctuation of opinion in the United States Courts.

In *Kent v. Hudson River R. W. Co.*, in the Supreme Court of the State of New York, 22 Barb. 278, reviewing and overruling *Wibert v. The New York and Erie R. W. Co.*, 19 Barb. 36, the judgment of the Court, an able and elaborate one, was delivered by Mr. Justice Smith. I will quote only the concluding part of his judgment. After expressing his dissent from the judgment given in the case in 19 Barb., he concludes (p. 296) thus: "The principle which measures damages at common law is that of giving compensation for the injury sustained—a compensation which shall put the injured party in the same position in which he would have stood had he not been injured: 2 *Parsons* on Contract, 432; *Co. Litt.* 257*a*. Now within the principle here stated, of giving a compensation for the injury sustained—a compensation which shall put the injured party in the same position in which he would have stood had he not been injured—what other rule can be applied to make him whole and indemnified for the defendant's breach of duty or default, but to hold him to make good the loss from the depreciation of the property from the time it should have been delivered till it was delivered? This is a simple plain rule, easily applied, and the only one which will afford a full indemnity. The learned Judge who tried this cause at the circuit left the case to the jury in a proper and judicious manner. He told them that the fall in the market between the times when the sheep should have arrived and when they did arrive, 'was a proper element of damage,' that the loss resulting from the delay, by preventing the plaintiff from availing himself of the market, was a proper subject for their consideration in estimating the amount of damages. The jury were directed to take the whole subject into consideration and give such damages as were just, in view of all the facts of the case."

That judgment was delivered in 1856; and in 1871 the same point was again before the same Court in the case of *Ward v. The New York Central R. W. Co.*, 47 N. Y. 29, and the case in 19 Barb. was again reviewed and dissented

from. I extract a few passages from the judgment: "It is well settled that a carrier, on an entire failure to deliver, is liable for the market price of goods at the time and place for delivery. * * * If liable for the market price at the time and place for delivery, where not delivered at all, it would seem equally rational that if, by reason of the inexcusably negligent delay of the carrier, the value of the goods has depreciated in market, he should be liable to the owner to the extent of that depreciation. The purpose of the law is to make the owner whole in each case." In another passage it is said: "Had the goods been injured by the improper exposure by the carrier, and thus had become depreciated in their market value, it is clear that the carrier would be liable for the loss. It was his negligence that caused it. Here his negligent delay caused the loss. It did not cause the decline in the general market, *but it deprived the owner of his right to the higher market price.* The defendant's negligent violation of his duty thus deprived the plaintiff of his right, and placed this loss upon him. In substance; this loss is the same to the plaintiff as if the injury had been done to the property itself and *thus* diminished its market value. The injury also is natural and direct. There is no second step; no action of the owner with a third person or otherwise. It is true there are fluctuations in the market. They prevail to some extent as to all commodities which are the subject of transportation. That is not a sufficient reason for abolishing their use in ascertaining the rights and liabilities of parties. Confessedly they regulate the rights of parties where there is an entire failure to deliver either by a carrier or by a vendor. Legally they are the true measure of the value of the goods. Arriving so late, later by the carriers' negligence, these goods were not worth as much as at the time they should have arrived; not so much when measured by the rule that governs the commercial community. Their actual value was less when measured by the only standard that regulates values."

The American cases on this branch of commercial law

are received with great respect in the English Courts, and the soundness of the reasoning by which those from which I have quoted, are sustained, commends them to our judgment. Any other rule than the one enunciated in those judgments would, I think, be technical, and arbitrary, and would fail to give the sufferer by the negligence of the carrier the compensation to which he is in reason entitled.

I understand that Mr. Justice Osler has computed the damages to which he has found the plaintiff entitled upon that principle; and I agree with the learned Chief Justice of the Court appealed from, that we should not disturb the finding of the learned Judge who tried the cause, as to the cause of the delay, in the plaintiff's not obtaining delivery of the goods upon their arrival in England until the 23rd of March.

In the case that I have put, of goods being sent without any fixed predetermination on the part of the sender to sell them immediately on their arrival, the carrier need not be placed in any unfair position. The maximum of compensation in such case should be the difference in market value at the date of their actual arrival and at the date when, but for the negligence of the carrier, they would have arrived; and, I should think, interest on that difference. If there be no fall in the market between those dates, or the date of actual sale, interest only should be recoverable; and so if there be a rise in the market and again a fall before actual sale, the difference between the highest price obtainable, assuming it still to be less than the market value at the date when the goods should have arrived and the market value at the latter date, would, I take it, be the proper measure of damages. I have considered this point, and I give my views upon it, because I have desired to see whether there is any practical difficulty in applying the rule where the sender of goods should send them, not necessarily for immediate sale, but intending to govern himself by the state of the market. I think that such a case presents no real difficulty. I have italicised some

passages in the American judgments that I have quoted, which assume, as I read them, that the rule applies to such a case.

The appeal should, in my opinion, be dismissed.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

COURT V. WALSH.

Statute of Limitations—Mortgage—Insolvency—Practice.

The judgment of the Chancery Division, (1 O. R. 167) affirmed, SPRAGGE, C. J. O., dissenting, the majority of the Court holding that an assignment, under the Insolvent Act of 1875, by an insolvent mortgagor, does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land.

Leave was given to the plaintiff to amend by setting up the Statute of Limitations upon payment of costs, which were paid to and accepted by the defendant. Upwards of a year afterwards the defendant objected that such order had been improperly made.

Held, that it was then too late to object that the order had been made in error.

THIS was an appeal by the defendant from a judgment of the Chancery Division (1 O. R. 167), and came on to be argued before this Court on the 2nd of February, 1883.*

Bethune, Q. C., and *Clute*, for the appellant.

J. MacLennan, Q. C., and *C. Biggar*, for respondent. The facts of the case and the authorities relied on, appear in the report of the case in the Court below.

December 11, 1883. SPRAGGE, C. J. O.—The defendant desires to appeal from the order of Mr. Justice Ferguson, of 12th December, 1881, giving leave to the plaintiff to amend by setting up the Statute of Limitations. I express no opinion as to the propriety of allowing the amendment, as I think that it is not now open to the defendant to

**Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON JJ.A., and GALT, J.

make the objection. It is made more than a twelvemonth after the making of the order. The order was made on payment of certain costs to the defendant, which costs have been paid to the defendant and accepted. The bill having been amended, an answer thereto was put in by the defendant, and the cause was heard in the presence of counsel for both parties. It is too late now to object that the learned Judge erred in allowing the amendment to be made.

The general question argued upon this appeal is a very nice one, and not without its difficulties. It is, so far as I am aware, a case of first impression.

We shall be aided in considering the point in question by ascertaining the exact position of the parties, in fact and in law, at the date of the insolvency of the O'Neills, the mortgagors.

At the date of the insolvency, 8th January, 1877, the relative position of the parties, mortgagors and mortgagee, was still subsisting. There was default in payment by the mortgagors on the 9th of September, 1869; so that, but for the insolvency at any rate, the rights of the mortgagee against the land would have become extinguished on the same date in 1879, more than two years after the insolvency. Proceedings in insolvency were still pending at the date of the filing of the bill in this case, and I understand are still pending.

In the first place, then, what changes were wrought by the insolvency. The land itself, and the rights and interest of the mortgagors in the land, were transferred to the assignee; and at the same time certain rights and remedies in respect of the land, as well as in respect of the mortgage debt, accrued under the statute to the mortgagee. The position and the rights of the mortgagee were put concisely and clearly by the late Chief Justice of this Court, in *Deacon v. Driffield*, 4 A. R. at 338: "The combined effect of sections 84 and 106 is to entitle the secured creditor to assume any one of three positions. He may stand outside the insolvency proceedings, and realize upon his security

in any manner the general law authorizes : whether after realization he can prove is a question which we are not now in a position to consider. He may release his security and prove in the insolvent Court for the full amount of his claim as an unsecured creditor. He may come into the insolvency proceedings and value his security, and then, whether the estate takes it at the valuation and ten per cent. additional or permits him to retain it, he may prove for the excess of his claim beyond the valuation." Under section 106 he may "come into the insolvency proceedings" in the mode and for the purpose described in section 84, "at any time before the declaration of a final dividend."

These are the rights of the mortgagee, which (unless he elects to exercise the first,) he may work out in the insolvency proceedings, without the aid of any suit outside of those proceedings; and he may do this until the declaration of a final dividend—a state of things not yet arrived at in the proceedings in insolvency.

Now the decision of the Court below, that the Statute of Limitations continued to run, *quoad* the mortgaged premises, during the pendency of the insolvency proceedings involves this, that the mortgagee has not up to the declaration of the final dividend to take such proceedings as a secured creditor as the statute entitles him to take. If he can keep alive his rights only by proceedings outside the proceedings in insolvency, he must institute a suit of a different character, and seeking a different kind of remedy, and that, it may be, not for the purpose of realizing his security by such suit, but simply to keep alive his right. If it be said that he should come in before the expiry of the statutory period of limitation, the answer is that the Insolvency Act gives him up to a proceeding in insolvency which may be subsequent to that period. The Limitations Act and the Insolvency Act should be so read as to reconcile them if it may be done. It may be done by holding the Statute of Limitations not to run pending proceedings in insolvency.

It is clear that time does not run under the statute *quoad*

a debt, and *inter alia* a mortgage debt; and that because the creditor may in the insolvency proceedings obtain payment or a ratable proportion of payment of his debt. If in the insolvency proceedings a mortgagee may obtain substantially what he may obtain by a suit for foreclosure, *puri ratione* the statute should not run. It appears to me that he may obtain substantially the same. In foreclosure he gets the land freed from the equity of redemption, unless the mortgage debt be paid; and so it is held that a foreclosure suit is a suit for the recovery of land. In insolvency proceedings the mortgagee may, under sections 84 and 106, get the land freed from the equity of redemption, unless its value, ascertained as provided by the statute, be allowed to him. The amount that he may get is immaterial; what is material upon this point is, that there is a process by which he may in insolvency proceedings obtain the land itself. It makes no difference that he may not obtain it. The point is, that the land itself, as mortgaged property, may be brought in question, and dealt with as such in insolvency.

If this be so, it would surely be an anomaly that a mortgagee whose mortgage is not barred by lapse of time, should be driven to institute a suit outside insolvency proceedings, in order to save the running of the statute, when he may realize his mortgage in those proceedings. It is to avoid this anomaly, and to avoid unnecessary litigation, that it has been held as a general rule that where a suit instituted by another is so constituted that a person may, by coming into it, obtain such remedy as he might have obtained in a suit instituted by himself, the Statute of Limitations will not run against his demand after the institution of that suit; and it has been held that the form of the suit is not material so long as a party entitled to a remedy may, in it, obtain his remedy: *O'Kelly v. Bodkin* 2 Ir. Eq. 361; *Bennett v. Bernard*, 12 Ir. Eq. 229.

The Courts have avoided placing too narrow a construction upon the Statute of Limitations, and we have the high authority of Lord St. Leonards in favour of a liberal con-

struction. In *Birmingham v. Burke*, 2 Jo. & Lat., at p. 714, he said : " Courts of Equity should be cautious not to render it necessary for every creditor to file a bill upon his debtor's death, in order to raise his demand, where one suit is regularly instituted ; " and adds, that that view was acted upon in *O'Kelly v. Bodkin*. *Bennett v. Bernard* contains passages to the same effect, and Lord St. Leonards in his treatise on the new statutes in relation to property reiterates the observation.

I abstain from a review of the cases of *Sterndale v. Hankinson*, 1 Sim. 393 ; *Berrington v. Evans*, 1 Y. & C. Ex. 434 ; or of cases in which those two cases have been observed upon. The authorities do, in my opinion, fully establish the principles that I have stated. There is one case which does, I think, come nearer to the case before us than any I have referred to. It was a case in the Incumbered Estates Court, *In re Colclough*, reported in 8 Ir. Ch. R. 330. A petition having been presented for the sale of lands, in which a Mrs. Beeman was interested under an instrument creating a charge upon them in her favour she made a claim, which was resisted, on the ground, among others, that it was barred by the Statute of Limitations. Lord Chancellor Brady, after quoting the language of Lord St. Leonards, in *Birmingham v. Burke*, to which I have already referred, adds : " So that when there is a suit instituted by a party for himself and others, any party who might have instituted such a suit may come in under it, and that it is to be considered a suit for him. This applies still more strongly to a suit in the Incumbered Estates Court ; for that Court is a public trustee for the parties interested in the lands to be sold. Therefore the moment the petition of 1854 was lodged, the Court became the trustee of the party, and the bar was stopped." The Lord Justice of Appeal expressed himself as clearly of the same opinion : and Lord St. Leonards, in the work to which I have referred, refers to the decision at p. 126, without a word of dissent ; and we know that that very learned Judge and high legal authority was in the habit, in his

text books, of noting his dissent or doubts in regard to cases of which he disapproved. He had done this two pages earlier in the same work, in referring to *Watson v. Birch*, as a "case which it might be found difficult to support." The inference is, that he regarded *In re Colclough* as a sound decision. I see no reason for doubting its soundness. It is only in affirmance of the same principle which had been established by numerous authorities in the case of creditors, and it applied the rule to the case of a charge upon the land; and no reason is suggested why it should not be applied to a person in that position.

I have discussed only the general question, for that only has been presented for our decision. I may say, however, that the inclination of my opinion is, that the fact, if it be the fact, that the value of the mortgaged premises is greater than the amount of the mortgage debt does not touch the question. It may be a reason influencing the mortgagee not to come into the insolvency proceedings, but cannot I apprehend affect his right to do so. The case may be put of mill or house property, (in this case it is house property in a town.) It would be proper for the assignee to insure it. It might be swept away by fire or flood, and become thereby of less value than the mortgage debt. If by fire, and the property insured, the estate would get the benefit of the insurance, and the mortgagee might properly come in under the sections.

Nor do I think the mortgagee barred by having brought ejectment against those in possession, who I may observe were not in possession under the assignee. It was an exercise of her right as mortgagee not incompatible with her coming in under the sections; and her doing so was not to the prejudice of the estate, but to its advantage, inasmuch as her debt was diminished by the amount of rents received by her.

Upon the best consideration that I have been able to give to the question, my conclusion is, that during the pendency of proceedings in insolvency, in which a mortgagee may come in under sections 84 and 106, the Real Property Limitations Act does not run against the mortgagee.

In my opinion, therefore, the appeal should be allowed.

BURTON, J. A.—The effect of the insolvency and the appointment of the assignee is to vest the property of the insolvent in the assignee for the benefit of the creditors, and he no doubt becomes a trustee for them of that property, and it follows that if the debts were not barred at the time the trust was created they are not subsequently affected by lapse of time. This is a position too clear to require any authority for it; but I fail to see how the assignee ever became a trustee for the defendant *qua* mortgagee. The property which vested in the assignee was the interest of the insolvent in it; that is, the equity of redemption, and nothing more. But the estate which was vested in the mortgagee remained unaffected by the insolvency of the mortgagor. The mortgagee was entitled to take any proceedings he deemed proper to enforce his security, either by ejectment or foreclosure.

The case of *Henderson v. Kerr*, 22 Grant 91, was, I think, well decided, and has not, so far as I have been able to discover, been weakened by any late decision.

I scarcely see how Mr. Bethune applies the recent decisions of *Heath v. Pugh*, L. R. 7 App. 235, and *Harlock v. Ashberry*, 18 Ch. D. 229. They decide what had previously been a moot point, that a proceeding in foreclosure is an action for the recovery of the land. I do not understand how they militate against the correctness of the decision in *Henderson v. Kerr*.

If it can be shewn that, as in the cases arising under the Encumbered Estates Act in Ireland, the assignee becomes a trustee for all parties interested in the land, and that in the insolvency proceedings the mortgagee may get all the relief which he could obtain by other proceedings, I admit that the appellant has gone a long way in making out his contention.

Section 72 of the English Bankruptcy Act, 1869, goes farther than our own in conferring jurisdiction on the Bankruptcy Court to deal with questions arising in refer-

ence to the bankrupt's property. They "shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide, for the purpose of doing complete justice, or making a complete distribution of property in any such case, and no such Court shall be subject to be restrained in the execution of its powers under this Act by order of any other Court."

The only similar section in our own Act is section 125, which professes to deal chiefly with the assignee, and enacts that he shall be subject to the summary jurisdiction of the Court in the same manner as other officers, and the performance of his duties compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property upon, in, or to any *effects or property*, (presumably personal property, found as it is in connection with effects,) in the hands, possession, or custody of an assignee, may be obtained on summary application, by the order of a Judge and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever.

Lord Selborne held in *Re Motion*, L. R. 9 Ch. 192, that the section referred to did not enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction property, or the owners of property, not vested in the assignee, and not originally subject to the administration in bankruptcy.

That case was referred to and followed by the Court of Appeal, in *Ex parte Parnell*, 6 Ch. D. 337, where an equitable mortgagee was endeavouring to enforce his claim in the Court of Chancery. It was there claimed by the trustee in bankruptcy that there was nothing due upon the mortgage, and that the matter in question could be much more conveniently disposed of under section 72, but Lord Justice James, after referring with approval to Lord Selborne's remarks, above quoted, adds: "When there is

a question like this, which goes to the very root of the title of a man who claims to be the owner of property under a mortgage from a bankrupt, and when he, in the exercise of his legal right, has brought it before the Chancery Division of the High Court, we have no power to withdraw it from the jurisdiction of that Court."

I am not overlooking the fact that the rights of a secured creditor are under that Act specially reserved to him under section 12, but I apprehend that without the aid of that section the result would necessarily have been the same; the rule being that a Court can only be ousted of jurisdiction by express words. So that even assuming that jurisdiction is given under section 125, it does not follow that the jurisdiction of the other Courts is taken away.

In the case of *Coulthurst v. Sewell*, 29 L. T. N. S. 714, the Court refused to interfere, at the instance of the trustee in bankruptcy, with a bill filed by a mortgagee to realize his security; and I refer to it chiefly for the purpose of quoting Lord Justice James's remarks, which appear to me to be peculiarly applicable to the present case. "The great fallacy," he says, "which seems to me to run through the arguments is in assuming that the mortgagee is a creditor, that is to say, it is mere accident that the person fills both characters of mortgagee and creditor. The mortgagee is not only a creditor, but he is the equitable owner of certain specific property, subject only to redemption, and his right in that respect is precisely the same as if he were not the equitable owner *qua* creditor, but as if he were an equitable owner subject to a right of repurchasing or any other right which enabled the person who conveyed to him to recover his property"

In the cases referred to under the Encumbered Estates Act the entire estate becomes under that Act vested in the commissioners, who are authorized to sell, and the statute declares that the purchaser of such sold estate shall hold the same discharged from all rights, titles, charges, and incumbrances whatsoever. In such a case the claim of the incumbrancer is converted into a claim upon the proceeds; and the moment therefore that the partition was filed the

Court became the trustee of all parties, and the statute ceased to run.

I am not at all disposed to question the correctness of the decision that where a bill is filed by a creditor on behalf of himself and all other creditors, the decree enures for the benefit of all creditors whose claims were not barred at the time of the filing of the bill. But here again I cannot refrain from referring to a remark made by the Lord Chancellor of Ireland, in *Bennett v. Bernard*, 12 Ir. Eq. 229, one of the cases referred to by the learned Chief Justice: "The reasoning," he says, "of the Judges goes on this, that the bill relied on, by whomsoever filed, must be in its nature one for the recovery of the demand sought to be saved from the bar of the statute;" referring to the fact that the bill in that case was a mortgage bill, and prayed a sale: and although probably in the course of these proceedings there must have been an inquiry as to incumbrances, and it was possible that the creditor then, if he had chosen to come in, might have proved his demand, yet he was not in privity with that suit, and it would not save his claim."

In the administration suit, as in the proceedings in insolvency, there is no doubt that the running of the statute ceases so as to preserve the claims as creditors of all persons who were creditors at the time the proceedings were commenced, but that, it appears to me, does not advance the argument.

I am unable to discover under our Act any power on the part of the assignee to compel the creditor to come in. I see no means under the Insolvency Act by which, if the assignee declines to redeem, the creditor can get the land freed from the equity of redemption, nor do I see any means whereby in a case similar to the present, wherein it is conceded that the value of the land exceeds the amount secured by the mortgage, the creditor could become a party to the insolvency proceedings without abandoning his security.

Under the sections referred to, 84, 85, and 106, if the assignee does not elect to take the mortgage security, the

creditor retains it, but what he retains is the mortgage. He does not obtain the equity of redemption; and with great deference, I see no possible means by which without abandoning his security he can come in. If he placed a value on his security it would exceed the mortgage money, and the only object in valuing the security is for the purpose of ranking as an unsecured creditor for the balance not covered by the security.

In such a case, therefore, there is no power on the part of the assignee to force the creditor to submit to the insolvency proceeding; no power on the part of the creditor to come in without abandoning his security.

I do not know that the question is any nearer a solution by considering the provisions of the insolvent law with regard to proof.

Section 80 provides that all debts due and payable by the insolvent at the time of the issue of the writ, shall have the right to rank on the estate. Section 82, that in the preparation of the dividend sheet, (that is, as regards all creditors who have proved,) due regard shall be had to the rank and privileges of every creditor; but no dividend shall be allotted or paid to any creditor holding security from the estate of the insolvent, until the amount for which he shall be entitled to rank is first ascertained—that is by valuation, as provided for in section 84.

It appears to me that it is still incumbent upon the creditor to keep alive the security; if, after proof of his claim as a secured claim, the assignee, acting under the direction of the creditors, or inspectors, or of his own motion under section 86, were to elect to take the security, it would be incumbent upon him to see that it was still a valid and subsisting security, and to take whatever steps might be necessary to keep it alive for the benefit of the creditors.

The 16th section of our Act defines what the assignee takes. The assignment shall vest in him all right, title, and interest in or to any real or personal property which the insolvent may be possessed of or entitled to up to the

time of his discharge *under the same charges and obligations as he was liable to with regard to the same*; and the assignee shall hold the same, that is, the interest, subject to the charges, in trust for the benefit of the insolvent and his creditors, and subject to the order of the Court.

The word "creditors" no doubt includes secured creditors. But such a person is something more than a creditor: he is a mortgagee also, and may choose to stand outside the insolvency proceedings altogether. How can the assignee by possibility be regarded as a trustee for him *qua mortgagee*?

Assume that the insolvent had given a mortgage to A, and had subsequently released his equity of redemption to B, undertaking to indemnify him against the mortgage, and then subsequently goes into insolvency. A. still remains a creditor, and may or may not, according to circumstances, think proper to rank on the estate; but until he does so the assignee has no interest in the mortgaged premises, the equity of redemption having been disposed of before the insolvency. Could it be pretended that in such a case there was any relation of trustee and *cestui que trust* between him and A. Can it be any more so in a case like the present, where he does get the equity of redemption—in other words, such estate as remained in the insolvent?

For these reasons I think that the interest of the mortgagee in the land remains unaffected by the insolvency of the mortgagor; and that the running of the statute was not interfered with; and that the judgment of the Chancellor was correct and should be affirmed, and this appeal dismissed, with costs.

I think the amendment, whether right or wrong, is not open to question on this appeal.

PATTERSON, J. A.—The whole question is, whether the plaintiff, as assignee in insolvency of the mortgagors, stands in a different position with regard to the operation of the Statute of Limitations from that which would have been

occupied by the mortgagors, or their assigns, if no insolvency had occurred; because it is not disputed that as against them the defendant's right of entry would have been effectually barred on September 9th, 1879.

The assignment in insolvency was on January 8th, 1877. The defendant took possession of part of the premises on March 24th, 1880, by attornment to her of the tenant, against whom and a subsequent mortgagee, who had defended as landlord, she had recovered in an action of ejectment commenced on September 12th, 1879, three days after the expiration of the ten years from the accrual of her right of entry. She obtained possession of the rest of the premises, without suit, on January 27th, 1880.

The defendant has not proved as a creditor in the insolvency proceedings. It is said a final dividend has not yet been declared. It is said also that the premises are worth considerably more than the amount of the debt they were mortgaged to secure.

I do not notice either of those facts stated in the case drawn up for use on this appeal; but the estate must necessarily be kept open pending the litigation as to this asset, if for no other reason.

My impression, after the argument, and until I was able to give closer attention to the case, was, that we should be able to hold that the proceedings in insolvency stopped or suspended the operation of the Statute of Limitations. One view which seemed not incapable of being maintained was, that the assignee, who, under section 16, holds all the assets in trust for the benefit of the insolvents and his creditors, might be considered to take this property, which was regarded in equity as belonging to the insolvents, subject to the charge for the mortgage debt, in trust for the mortgagee as one of the creditors, for the preferential lien, and for the creditors generally and the insolvent as to its value beyond that charge, and that so an express trust arose which would prevent the trustee from setting up the statute; but I have not been able to satisfy myself that that position would be tenable.

Whether or not the assignee had been in receipt of the rents of this property, as one would suppose he should have been, we have not been informed. Possibly the second mortgagee, who defended as landlord, was in possession; and if he was rightly so, we are not told how the assignee acquired the right of possession he is now asserting.

However that may be, if we assume the assignee to have taken possession, and ejectment to be brought against him by the mortgagee, it is not easy to see what defence to that action he could base upon the fact that his title was as assignee in insolvency. If the mortgagee was to be deprived of the right of entry upon property to which at law his title was absolute, and the legal rights in which a Court of equity would not interfere with, except by giving a right to redeem, it must be by the substitution of some equivalent right or remedy under the insolvent law. I do not find any such right or remedy. The provisions of section 94, as to secured creditors valuing their security, apply only to those who prove claims as creditors. The nature and amount of the security are to be specified *in the claim*, and *therein* the creditor is on oath to put a value thereon.

The terms of this section do not meet the case of a creditor whose security is worth more than his debt. Section 106 merely gives a right to a secured creditor to value or release his security, and to prove as unsecured for part or the whole of his debt, which he may do at any time before the declaration of a final dividend. I have not attempted to form a precise opinion as to what would be the position of a creditor who came in under this section after one or more dividends had been declared, as the assignee could scarcely be expected, under section 94, to reserve a dividend for one who was already secured, and who had not proved and valued his security under section 84. I suppose he would rank along with any unsecured creditor who came in and proved at the same time. I was for some time inclined to take the view of

this section which has been put by his lordship the Chief Justice, as indicating that the security held by a creditor at the time of the insolvency, and which he might then have surrendered, was to remain good in his hands for him to retain or to surrender at his option up to the declaration of the final dividend, and so as opposed to the operation now claimed for the Statute of Limitations; but on reflection I have abandoned that idea. My present opinion is, that section 106 does not help the defendant. If her security has by her laches reverted to the estate without a voluntary surrender of it by her, she may prove for her debt as unsecured, and be in the same position as if under that section she had released the security.

The authorities seem to me, as far as they apply, to support the opinion that the assignee could not resist an action of ejectment by the mortgagee. *Henderson v. Kerr*, 22 Grant 91, was decided by Blake, V. C., upon that understanding of the law, and the same may be said of the case of *Coulthurst v. Smith*, 29 L. T. N. S. 243 and 714, in which Malins, V. C., and the Court of Appeal, who affirmed his judgment, overruled a demurrer for want of equity to a bill by an equitable mortgagee of a bankrupt's share of the assets of a partnership, which was filed by the mortgagee against the trustee in bankruptcy, praying for the appointment of a receiver of the property, subject to the mortgage, and that the defendant might be restrained from obtaining possession thereof. My brother Burton has quoted some remarks of James, L. J., in delivering judgment in that case.

In *Deacon v. Driffl*, 4 A.R. 335, and in *Re Beaty*, 6 A.R. 40, I discussed the effect of sections 84 and 106, with reference to the questions we had before us in those cases; and in *Re Barrett*, 5 A.R. 206, I had occasion to express the opinion that the provincial laws relating to ownership of property in the province were properly resorted to in determining the right of the assignee in insolvency to the asset which was there in question.

Those discussions, while not directly upon the points involved in the present case, are not entirely foreign to them.

On the whole it appears to me that there is nothing in the operation of the insolvent act to deprive the mortgagee of his right of entry upon land mortgaged to him by the insolvent, or of his right of action to enforce it against the assignee if he assumes the possession, and from that the conclusion appears inevitable that if he does not assert his right within the statutory period he is barred.

I concur in dismissing the appeal.

GALT, J.—In this case the defendant, relying on her mortgage, refrained from making any claim against the estate of the insolvent; nor did she assert her right against the tenants in possession until after her power to do so had expired by lapse of time. She then brought an ejectment, and no defence under the Statute of Limitations being made, she recovered possession. She now contends that the assignee is a trustee for her, and consequently cannot maintain this suit to obtain possession from her, as the Statute of Limitations does not run as between trustee and *cestui que trust*. It is true that the statute cannot be set up as a defence to her claim as a creditor, and her rights as such are protected by the judgment appealed from, but the question now is, whether she has not lost her security over the land. The statute is express, that after the determination of the period limited the right of the party to bring an action, &c., shall be extinguished; consequently at the time she entered into possession she had no title whatever.

I am therefore of opinion that the judgment of the learned Chancellor is correct, and should be affirmed, and this appeal dismissed. See the case of *Bryan v. Cowdal*, 21 W. R. 693.

NORVELL v. THE CANADA SOUTHERN RAILWAY COMPANY.

CUNNINGHAM v. THE SAME.

DUFF v. THE SAME,

GATFIELD v. THE SAME, and

THE CANADA SOUTHERN RAILWAY COMPANY v. NORVELL
CUNNINGHAM, DUFF, AND GATFIELD.

Award under Railway Act, Ch. 66, C. S. C.

Held, that The Canada Southern Railway, although brought under the jurisdiction of the Dominion before proceedings had been taken for expropriation, was still subject to the Railway Act then in force in Ontario, Ch. 66 C. S. C.

An award having been declared void by the Supreme Court, was amended so as to meet the objection, and re-executed by the arbitrators after the time limited for making the award had expired. The company having filed a bill to set aside such award, as well as the original award, the defendant, by his answer, asserted the validity of both. The bill was dismissed on the ground that it was unnecessary. *Held*, that this, in effect, affirmed their validity, and an appeal was allowed.

Held, also, that where the company's arbitrator had not been notified pursuant to the statute of the time and place appointed for signing awards between the company and land owners, such awards were invalid by the statute C. S. C. ch. 66, sec. 11, sub-sec. 11, and that, although he had notified the other arbitrators that he would not attend, and waived any notice.

THIS litigation arose out of suits brought in the Court of Chancery by landowners for the purpose of enforcing the specific performance of awards made in their favour against the company under the Railway Act, ch. 66 C. S. C.

Decrees were made in favour of the plaintiffs, from which the defendant company appealed unsuccessfully to this Court, and thence to the Supreme Court, where, upon objection taken for the first time, it was held that the award in Norvell's case was void on its face as dealing only with his interest which was simply an equity of redemption in the lands, and it was directed that the company should be at liberty to amend by alleging this fact, and that upon making this amendment the award should be declared null and void.

In the other cases objection was also taken, and for the

first time also, to the validity of the awards, on the ground that they were signed by only two of the three arbitrators acting in the matter; and that it did not appear that notice had been given to the third arbitrator of the time and place of signing the award, as directed by sec. 11, sub.-sec. 11; when the Supreme Court gave the company liberty to amend alleging these facts, and directed that upon the amendments being made the plaintiffs should be at liberty to set the cases down for new trials,

The necessary amendments were made in each case. The landowners thereupon procured the person who had been their arbitrator, and the third arbitrator (appointed by the County Judge), to give notice to the person who had acted in the matter as the arbitrator for the company, that they had appointed a time and place for signing all the awards. The company objected to this proceeding; their arbitrator did not attend, and the two other arbitrators met, amended the Norvell award by stating that the amount of compensation awarded was for the estate in fee in the land, and re-executed all the awards.

The company immediately afterwards filed bills to set aside these new awards, or whatever they purported to be, and also raised objections to the original awards which they alleged they had only discovered since putting in their defences in the original suits.

The plaintiffs Cunningham, Duff, and Gatfield, proceeded to new trials in their suits; and the company brought their cross-actions on at the same time, as well as their action against Norvell, when the Court (Spragge, C.) gave judgment in favour of the plaintiffs in the four suits. In the case of the Company against Norvell, the defence, shortly stated, was that the action was unnecessary, the award being void, and the Court adopting this view dismissed the bill, with costs.

In the other three cases the chief ground of defence was, that notice to the third arbitrator—the one named by the company—was unnecessary, as he had notified the other two arbitrators that he objected to the award and

would not attend to sign it. A question was also raised, which is dealt with in the judgment, as to whether there was a valid arbitration at all, as the third arbitrator had been appointed under chapter 66, after the defendant company had become a Dominion corporation.

The appeals came on for argument on the 1st and 2nd days of February, 1882.*

Crooks, Q. C., and Cattanach, for the appellants.

S. H. Blake, Q. C., and W. Cassels, for the respondents.

The questions argued are stated in the judgment.

January 24, 1884. PATTERSON, J. A.—The plaintiffs, the railway company, filed their bill on the 30th October, 1880, setting out that having required to take certain land of Norvell for the purpose of the railway, and their offer of compensation not having been accepted, they appointed one Kingsmill their arbitrator, and Norvell appointed the defendant Rankin his arbitrator, and the Judge of the County Court appointed the defendant Wilkinson as third arbitrator; and that the defendants Rankin and Wilkinson in the absence of Kingsmill who had not notice of the meeting, met on the 21st March, 1876, and made an award for a large sum for damages, expenses, and costs.

They then shew that in April, 1876, they filed a petition in the Court of Queen's Bench to review or set aside the award, which petition was dismissed by the Chief Justice of that Court, against whose decision they appealed to this Court, but ineffectually, inasmuch as the Court held that it had not jurisdiction to entertain the appeal.

Thereupon, they go on to allege, Norvell filed his bill in Chancery for specific performance of the award; to which the plaintiffs answered that the amount awarded was unduly excessive and fraudulently exorbitant, and that the award was therefore unjust, and they submitted that

**Present.*—BURTON, PATTERSON, MORRISON, JJ.A., and ARMOUR, J.

it should be declared to have been obtained by fraud, and to be void; but the Vice-Chancellor, before whom the case was heard, restricted the company, in giving their evidence, to the issue of fraud, and pronounced a decree for Norvell, and this Court dismissed the company's appeal from that decision.

Then it appeared for the first time, the bill goes on to aver, from the views expressed by the Court of Appeal, as well as for reasons derived from legislative enactments, which reasons are given, that the petition on which Chief Justice Harrison had pronounced was *coram non judice* and his decision therefore a nullity.

It is then shewn that the defendants, the Canada Permanent Loan and Savings Co. and Molsons Bank, were made parties plaintiff to Norvell's action, as incumbrancers upon his land; that the decree ordered the railway company to pay Norvell \$9,294.42, being the amount of the award with interest and costs, upon which he was to release to the company the lands they had expropriated; and that the company appealed to the Supreme Court from the judgment of this Court which affirmed that decree, upon which an order was made on 21st June, 1880, which is set out in these words: "That the Canada Southern Railway Company be at liberty to amend their answer in the said cause in the Court of Chancery, as they may be advised, in order to shew that the award in the plaintiffs' bill mentioned was in respect of the interest of the said Dallas Norvell in the lands and premises in the said award set forth, and which was the equity of redemption therein, and not the fee simple thereof, and that the said award was therefore invalid and of non-effect, and that upon such amendments having been made, this Court did order and adjudge that the said award be declared null and void."

The bill then complains that notwithstanding the amendment, which was made in the terms of the order, and the effect of making which was, by force of that order, to annul the award, the defendants Rankin and Wilkinson did, on the 8th September, 1880, alter the award by striking out the reference to the interest of Norvell in the

lands, and making it an award of the sum originally fixed for the whole fee simple, and not merely for Norvell's interest, and did remake and republish it in its altered state.

Having thus stated the facts of which I have given a summary, the bill proceeds to charge that the award of 8th September is invalid, because it was an attempt to revive the award that had been avoided by the order of the Supreme Court, and because the arbitrators were *functi officii*, the time for making the award, which the order of the County Court Judge had fixed as 15th May, 1876, not having been enlarged; and further, that the original award was voidable, on grounds of which the company had now for the first time become aware; and by reason of the erroneous ruling of the learned Vice-Chancellor at the trial as to no question being open but that of fraud; and because Kingsmill, one of the arbitrators, had not sufficient notice of the meetings—this objection applying to both awards; and because the third arbitrator should have been appointed by the Minister of Public Works and not by the County Judge; and by reason of misconduct of the defendants Rankin and Wilkinson, and the unreasonable amount awarded, which, it is alleged, shews the award to be fraudulent; and for one or two other reasons.

The prayer is, that the awards may be set aside, and the defendants Rankin and Wilkinson restrained from acting upon or attempting to enforce the awards, and from assuming to act as arbitrators.

The defendant Norvell, by his answer, disputed the correctness of the company's statement of some of the facts; submitted that the matter was, as to the merits of the award, *res judicata*; set out a notice given by Kingsmill to the other arbitrators on 16th March, 1876, as follows: "I do not intend to sign the awards for the amount you gentlemen have determined upon, and therefore will not attend any meeting called for the purpose of executing the same, and waive all notice or notices that might be necessary for the purpose of such execution;" the effect of which, as well

as the re-acknowledgment of the making of the award on 8th September, 1880, Norvell submits is an answer to the objection of want of notice; and, further, he submits that so far as the bill complains of what was done by the arbitrators on 8th September, it discloses no case requiring the aid of the Court, and he claims the same benefit from this objection as if he had demurred to the bill.

And he concludes by praying by way of cross relief that the company may be ordered to pay the amount with interest mentioned in the award, which he submits the arbitrators who agreed upon the amount of compensation had power to award, notwithstanding the lapse of the time limited in the Judge's order, contending that they were not discharged from their duties until they had given formal expression to their decision.

The defendants, the incumbrancers, also answered, and so did the defendants Rankin and Wilkinson, who submit amongst other things, that they are not properly made parties. They allege that what they did on 8th September was done in good faith, and with a view to repair as far as possible any objections of a technical kind to the recovery of the compensation awarded to Norvell, and simply to give formal expression to the judgment already arrived at, on and shortly before 7th March, 1876, and under advice that they did not cease to be arbitrators, and were not discharged from their duties as such until they had signed an award in proper form to effectuate the judgment at which they had arrived upon the matters referred to them; and that they consider they are now discharged and have no intention to act further in the matter. The allegations of fraud and misconduct they submit are *res judicatæ*, notwithstanding they were not parties to the former suit.

None of the defendants, except Norvell, assert in their answers the validity of the awards.

The action came on for trial before the present Chief Justice of Ontario, when Chancellor.

The only note given us of his opinion is a memorandum in the words: "Bill dismissed, with costs, as unnecessary;"

and the decree as drawn up is, "that the plaintiffs' bill of complaint be, and the same is hereby dismissed out of this Court, with costs to be paid by the plaintiffs to the defendants forthwith, after taxation thereof."

From this decree the plaintiffs appeal, setting out as their grounds that the proceedings were necessary in consequence of the wrongful re-execution of the award on 8th September, in connection with which they call attention to the pleadings of the defendants which assert the validity of the award, or the authority of the arbitrators, and to a number of other considerations which are arguments for the position they take. Secondly, that the decree, (which they allege was settled in the form in which it appears against the explicit objections of the plaintiffs), by dismissing the bill as it does, in effect affirms the validity of the award. Thirdly, that the decree is erroneous in principle in awarding against the defendants greater costs than those of a demurrer.

In answer, the respondents take the ground that the judgment and the decree founded thereon are right, for the reasons stated by the learned Chancellor; and they assert that it was unnecessary to file the bill, and that the proceedings are improper and vexatious.

The special Act of the plaintiffs was the Statute of Ontario 31 Vict. ch. 14, passed in February, 1868, which incorporated certain provisions of the Railway Act, ch. 66, of the Consolidated Statutes of Canada, including those headed "Lands and their valuation."

In 1874 the company became subject to the jurisdiction of the Parliament of Canada by virtue of the Dominion Act 37 Vict. ch. 68, which declared it to be a body corporate and politic within the jurisdiction of Canada, for all and every the purposes mentioned, and with all and every the franchises, rights, powers, privileges, and authorities conferred upon it by virtue of the Ontario Acts which are recited, including the company's special Act, "subject always to any conditions or limitations imposed by the said recited Acts, or any of them."

One point made for the plaintiffs in this case, and referred to in the bill as founded on something which only came to the knowledge of the plaintiffs after the judgment delivered in this Court upon a former appeal, seems to owe its origin to a misunderstanding of an expression of the late Chief Justice who delivered the judgment. Referring to a previous attempt to appeal from a judgment of Chief Justice Harrison, who had dismissed a petition which the plaintiffs had presented under the Ontario Act, 38 Vict. ch. 15, by way of appeal from the original award, his lordship said, 5 A. R. 19 :

"It was strenuously argued that the question in controversy became *res judicata* by the decision of the Chief Justice of the Queen's Bench. I incline to think that the learned Judge had no power to review the finding of the arbitrators upon a petition presented under the Act of the Ontario Legislature, 38 Vict. ch. 15. These lands were, as I understand, expropriated under the authority of the Act of the Dominion, by which a new charter was in effect granted to these defendants ; and it admits of grave question, whether an Act of the Ontario Legislature, could extend to or affect proceedings so taken. I content myself, however, with directing attention to this point. In the view that we take of the points discussed, and in the absence of argument which might throw an entirely different light upon this question, it would not be proper to express any positive opinion."

The "new charter" alluded to was the Act of 37 Vict. ch. 68, which gave the company the status of a corporation under the jurisdiction of Canada, and no longer under that of this province. The lands were expropriated after that event. But the terms of the original Special Act, and the incorporation with it of the provisions of C. S. C. ch. 66, were not annulled or varied or replaced by any other provisions. On the contrary, the Act 27 Vict. ch. 68, guarded against any such inference. It is *a fortiori* the case that the provisions of the Railway Act of 1868 of the Dominion, 31 Vict. ch. 68, were neither by its terms, nor the terms of 37 Vict. ch. 68, made applicable to this company. The question suggested was whether a Provincial Act, giving an

appeal from one of these railway arbitrations, could affect or apply to a railway company which, before it passed, had ceased to be under the provincial jurisdiction. If the language used by the learned Chief Justice had been ambiguous, it would of course be read with reference to the subject he was speaking of, and not as pointing to something which was not before him. But it was not ambiguous, and it expressed no doubt of the corporate powers, liabilities, and limitations under the original charter remaining undisturbed by the change of jurisdiction.

Amongst the provisions of Consol. Stat. Can. ch. 66, which come in question are those found in sec. 11, clauses 10thly, 11thly, and 14thly, which vest in the County Judge the power to appoint a third arbitrator when the arbitrators for company and land-owner fail to agree upon one; and which require the Judge to fix a day on or before which the award shall be made, with power to him to enlarge the time by order, or to the parties to enlarge it by consent; and which declare that, when there are three arbitrators, no award shall be made or any official act done by a majority except at a meeting held at a time and place of which the other arbitrator has had at least one clear day's notice, or to which some meeting at which the third arbitrator was present had been adjourned.

One objection taken on the part of the company, which the bill alleges to have first come to the company's knowledge after the judgment of the Court to which I have been referring, is to the constitution of the board of arbitrators, on the ground that the third arbitrator was appointed by the County Judge, and not, as required by the Railway Act, 1868, by the Minister of Justice. Had there been any foundation for this objection it would have been conclusively met by the answer given to it in the Court below, in the case of Cunningham and others, with which I have to deal, namely, that the appointment was made at the request of the plaintiffs and was fully acquiesced in. But, as I have pointed out, the objection rested upon a misconception of the remarks of Chief Justice Moss.

Another objection which it may be convenient to notice here, although it is not so directly in question in Norvell's case as in the others, is, that the original award was invalid because executed by two arbitrators only, and at a meeting of the time and place of which the third arbitrator had not notice. The facts relating to this are shewn by the bill, which asserts that the meeting was held without the notice being given, and the answer, which does not deny that the fact was as stated, but excuses the omission by shewing the express waiver of notice by the third arbitrator, who declared he would not sign an award for the amount which on the 16th March, 1876, the other two had decided to assess; and that he would not attend any meeting for the purpose of signing such award.

I have examined the cases cited to us on this subject. I am strongly inclined to the opinion that upon the ordinary rules by which the proceedings by arbitrators are held to be governed it would be impossible to sustain the award against this objection(a). I may refer to *Mordue v. Palmer*, L. R. 6 Ch. 22, amongst the English cases cited, and to *Re Corporation of Toronto and Leuk*, 23 U. C. R. 223, amongst the cases, which are rather numerous, in our own Courts. But I do not enter upon a discussion of the decisions, because the statute has not left the rights of the parties to be tested simply by common law rules. It forbids, in the positive enactment I have quoted, the making of any award or the doing of any official act by a majority of the arbitrators, except at a meeting held at a time and place of which the other had notice; and the provision of "19thly" against invalidating an award for want of form or other technical objection, applies only "if" (amongst other things), "the requirements of this act have been complied with." There was not much said in the argument before us of this feature of the case, and I believe I am right in my understanding that the terms of the statute were not brought to the notice of the learned Chancellor at

(a) See *Nott v. Nott*, 5 O. R. 283.

the hearing, but in the face of the express provision, it is obviously impossible that the award could be allowed to stand.

The second award, or the award as altered and re-executed cannot on any ground be supported. Even if the time limited by the Judge's order had not expired, the arbitrators were *functi officii* as soon as they executed the first award. *Mordue v. Palmer* lays down this doctrine very clearly, and the principle on which the careful provision of the statute to which I have just referred proceeds enforces it. But there is the unanswerable argument that the time, which was fixed in obedience to the statute, had long elapsed.

These points were not dealt with by the learned Chancellor in Norvell's case, doubtless because the original award had been set aside by the order of the Supreme Court; but both awards had been attacked by the plaintiffs' bill, and the answer of Norvell had asserted the continued validity of both of them. Hence the decree, which simply dismissed the bill, with costs, was equivalent to an affirmance of their validity, and therefore this appeal should be allowed.

The only ground really decided by the learned Chancellor was, that the bill was unnecessary, giving effect to the objection which was taken as a ground of demurrer. I have not been convinced that that decision was wrong.

It was urged that the award was a cloud on the plaintiffs' title, as implying a lien for purchase money, and that it might even be registered.

There is a right in the defendant to be paid for his land, whether the amount awarded, or another amount, remains to be seen.

The ordinary right of the company is only to take possession after payment of the compensation; but having shewn to the Judge's satisfaction that immediate possession was necessary to carry on some part of the railway, possession has been given under a warrant granted by the Judge.

The idea of a cloud upon a title of this sort arising from

an award which is futile and void, is too fanciful to form a reason for the interference of the Court.

One or two cases have been found in which an award has been set aside, although apparently void for reasons similar to those that apply in the present case. One is a decree made by Lord Hatherley, when Vice-Chancellor, in *Crump v. Moretonhampstead and South Devon R. W. Co.*, which is noted in the Weekly Notes for 1869, at p. 270.

The most recent case on the subject is *North London R. W. Co. v. Great Northern R. W. Co.*, 11 Q. B. D. 30, in which the Court of Appeal, consisting of Brett and Cotton, L. JJ., reversed a decision of a Divisional Court composed of Field and Stephen, JJ., and held that the High Court had no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although the arbitration might be futile and vexatious. The question of law decided by that case, as I understand it, is, that where before the Judicature Act there was no remedy, the statute has not conferred power upon the High Court to interfere by injunction. The judgments in the case are instructive for the reference they contain to other recent decisions as well as for the principles laid down.

But the question before us on this appeal is not whether a decree declaring the award void could be sustained. It is whether the learned Chancellor was wrong in saying the bill was unnecessary; in other words, in declining to stay the claim. I do not think he was wrong; and, therefore, if the appeal had been on this ground alone, it ought, in my judgment, to have been dismissed.

There is force in the appellants' contention that the costs adjudged against them ought only to have been those of a demurrer, and possibly that may have been the intention of the learned Chancellor when he put his decision upon the one ground only.

We could not entertain an appeal upon the question of these costs alone; but as the appellants succeed in their attack on the decree, which must be varied so as to confine

its effect to the point actually decided, there is no objection, on legal grounds, to our varying it also with respect to the costs. I am not prepared, however, to decide that the award of costs as it stands is unjust, having regard to the fact that the plaintiffs, by their bill, invited a contest upon the old charges of fraud and misconduct, and advanced the objections to the constitution of the board of arbitrators which they had no right to treat as newly discovered matters, the fact being that they arose upon a view of the law which had not occurred to the plaintiffs till suggested by the Court, but which I consider unfounded; besides making the arbitrators parties, which seems to me to have been unnecessary. On the whole, I am not disposed to interfere with the adjudication as to the costs.

I think we should allow the appeal with costs, varying the decree as I have indicated.

THE CANADA SOUTHERN RAILWAY COMPANY v. HENRY H. CUNNINGHAM, ARTHUR RANKIN, AND ALEXANDER WILKINSON.

SAME PLAINTIFFS v. HENRY G. DUFF, ARTHUR RANKIN, AND ALEXANDER WILKINSON.

SAME PLAINTIFFS v. WILLIAM H. GATFIELD, THE CANADA PERMANENT LOAN AND SAVINGS COMPANY, ARTHUR RANKIN AND ALEXANDER WILKINSON.

CUNNINGHAM v. CANADA SOUTHERN RAILWAY COMPANY.

DUFF v. CANADA SOUTHERN RAILWAY COMPANY.

GATFIELD v. CANADA SOUTHERN RAILWAY COMPANY.

We have here three actions against the Canada Southern Railway Company for specific performance of awards, and three cross actions to set those awards aside.

The bills filed by the company are similar in their form and in their allegations to that in Norvell's case, with the exception I am now about to state.

It will be remembered that the bill against Norvell shewed that he had brought an action for the specific performance of his award, and that, on appeal to the Supreme Court, an amendment of the company's answer was allowed, and thereupon the award was declared void.

In the actions of these three parties, Cunningham, Duff and Gatfield, a different order was made. I read the statement of the order and of what followed thereupon from the plaintiff's bill against Cunningham. *Mutatis mutandis* it is the same in the cases of Duff and Gatfield:

"On the 21st day of June last the Supreme Court gave judgment on the said Appeal, and did order and adjudge 'that the Canada Southern Railway Company be at liberty to amend their answer in the said cause in the Court of Chancery, as they may be advised, in order to shew that the award in the plaintiffs' bill mentioned was made by Arthur Rankin and Alexander Wilkinson, two of the arbitrators mentioned in the plaintiffs' bill, in the absence of and without notice of the meeting of the said two arbitrators to John Juchereau Kingsmill, also an arbitrator in that behalf; and with liberty to the said Henry H. Cunningham, on or before the 10th day of September next, to file with the Registrar of this Court the signification signed by counsel of his desire for a new trial of the said cause, when such new trial shall be granted without costs to either of the said parties. But in case the said Henry H. Cunningham should omit to so desire a new trial upon such amendments having been made, this Court did order and adjudge that the said award be declared null and void.' And on the 14th day of September, 1880, the said answer of the plaintiffs in the said cause therein was thereupon amended in the words following. '8 A. The defendants further shew that the said award in the fourteenth paragraph in the plaintiffs' bill mentioned, after the recitals in the said award contained, was and is in the words following, that is to say: 'Now know ye, that we the said Arthur Rankin and Alexander Wilkinson, do make this our award in writing in manner following, that is to say,—we do award, settle, order, and determine that there is due from the said the Canada Southern Railway Company, to the said Henry H. Cunningham, the sum of \$2,580, as and for the purchase money and compensation of the said Henry H. Cunningham in the said lands and premises taken as aforesaid, and for the damages to be sustained by the said Henry H. Cunningham in respect thereof, by the exercise by the said railway company of the powers contained in the said Act. 8 A. The defendants shew, as the fact is, that the said award was made by the said Arthur Rankin and Alexander Wilkinson on the 21st day of March, 1876, as in the said 14th paragraph of the bill mentioned, in the absence of and without notice of the said meeting of the said two arbitrators to the third of the said arbitrators, the said John Juchereau Kingsmill, in the twelfth paragraph of the plaintiffs' bill mentioned. Wherefore the defendants submit and insist that upon this ground also the said award was and is illegal and void, and should be set aside accordingly.'

" 20. The defendant Cunningham by his counsel filed the signification aforesaid within the time limited, but has taken no further step therein. notwithstanding the said order and the circumstances aforesaid, the defendants, Arthur Rankin and Alexander Wilkinson, without notice to the plaintiffs, and without their knowledge and assent, did on the 8th day of September, now last past, assume to make and publish the same award, and they did in fact on that day re-make and republish the same, without any notice to the plaintiffs."

With the exception of this passage the bills in all four cases are identical, and the four answers take the same ground, not denying the absence of notice, but setting up Mr. Kingsmill's waiver; and the bills in the specific performance actions were amended to the same effect.

The issues thus presented in the two sets of actions were those relating to the constitution of the tribunal; those touching misconduct on the part of the arbitrators; and the sufficiency of the notice from Mr. Kingsmill to dispense with the notice of the time and place of the meeting to execute the award.

We have in these cases, as in Norvell's, only a short minute from the learned Judge who tried them of his decision. It is in these words:

" Plaintiffs cannot now object that the arbitrators were not properly constituted, because a Dominion railway, as the appointment of the third arbitrator was assumed by all parties, and made at the request of the plaintiffs by the County Judge. They cannot now repudiate their own act and take advantage of their own wrong.

The additional evidence was not important on issues allowed to be tried by the Supreme Court.

The point of ' legal misconduct ' is not open to the plaintiffs to raise, they are too late ; but assuming it to be so, it is not proved. The evidence does not lead to the opinion that the arbitrators acted on an erroneous principle. The amounts awarded do not shew legal misconduct. The costs to follow result."

The company's bills were dismissed, and decrees were made for specific performance in the three actions against the company.

The issues referred to in the learned Chancellor's memorandum, as allowed to be tried by the Supreme Court, were those relating to the execution of the awards.

Evidence was taken before him, but not upon those issues, because the facts touching them were admitted on the pleadings,


I have already stated the reasons why I am of opinion that the awards cannot be held to be valid; some of those reasons which depend upon the terms of the Railway Act Consol. Stat. Can. ch. 66, not having been, as I understand, brought to the learned Chancellor's attention when the cases were heard.

I have also given some reasons, in addition to those noted in the memorandum, why in my judgment the constitution of the arbitration board could not be successfully attacked. I agree with the learned Chancellor in his views on that issue, and also on those relating to the alleged misconduct of the arbitrators; but as I am of opinion that the awards are invalid for want of notice to Mr. Kingsmill of the time and place of the meeting at which they were executed, I think our only course is to allow the appeals, with costs; to dismiss the bills of Cunningham, Duff and Gatfield against the company, with costs; and, in the cross actions of the company against those parties, to declare that the awards were not validly executed, and are therefore void. I do not think those actions were necessary, as the same questions could have been, as they in fact have been, litigated in the other actions.

I should, therefore, give no costs of the cross actions.

BURTON and MORRISON, JJ. A., concurred.

ARMOUR, J., was not present when judgment was delivered.



PATERSON V. THOMPSON.

Distress for rent—Joint ownership of goods.

The judgment of the Court below (46 U. C. R. 7) reversed, as the plaintiff had not shewn that he was solely entitled to possession of the logs, the subject of distress and the seizure as regarded his co-owner being lawful the plaintiff could not maintain replevin, SPRAGGE, C. J. O., dissenting, who thought that even if the logs were the joint property of the plaintiff and one of the tenants, and had been delivered to the millers for the purpose of being manufactured into lumber, they could not be distrained on, for their being on the premises for that purpose had the effect of exempting them from distress; and that under the circumstances there should be a reference back to the Judge who had already tried the case to find the facts more distinctly. In the event of that being impracticable that there should be a new trial.

THIS was an action brought to replevy 100,000 feet of lumber and twenty-one saw-logs seized for rent alleged to be due the defendant.

The defendant pleaded (1) that he did not take the goods, &c.; (2) that the said goods were the goods of the defendant, and not of the plaintiff as alleged; (3) "that Thomas Matthewson and Robert D. Paterson, during all the time in which the rent hereinafter mentioned to be distrained for accrued due, and thence and until and at the time of the alleged taking of the said goods held the said land and premises thereon as tenants thereof to the defendant under a demise thereof at the yearly rent of \$1,000, payable half-yearly, on the first days of March and September, in every year by equal portions; and because \$1,400 of the said rent at the time of the alleged taking was due and in arrear from the said M. and P. to the defendant, the defendant well avows the taking of the said goods on the said land and premises and justly, &c., as a distress for the rent so due and in arrear as aforesaid, which still remains due and unpaid."

The plaintiff took issue on the first and second pleas. He replied to the third plea that M. and P. did not hold the land as alleged.

And for a fourth replication to the said third plea, the plaintiff said "that before and thence until and at the time of the taking of the said 100,000 feet of lumber, being part of the said goods taken as aforesaid, the said M. and P. were saw-millers and manufacturers of lumber, in the

business and trade of saw-millers and lumber manufacturers, then carried on on the said land and premises, being the land and premises in the declaration mentioned, of which premises the defendant then had notice: and that before the taking of the said 100,000 feet of lumber, and while the said M. and P. carried on the said business and trade as aforesaid, the plaintiff employed the said M. and P., in the way of their said business and trade, as his workmen for certain wages in that behalf to work up and manufacture into lumber, on the said land and premises, certain saw-logs of the plaintiff, and for that purpose the plaintiff before the time of the taking of the said 100,000 feet of lumber, had delivered to the said M. and P. the said saw-logs, in order that the said M. and P. might, on the said land and premises, work up and manufacture the said saw-logs into lumber as aforesaid for the plaintiff, and that the said M. and P. might, when and as soon as the said saw-logs should be so worked up and manufactured as aforesaid into lumber, return to the plaintiff the lumber so to be manufactured as aforesaid. That the said M. and P., at the time aforesaid and before the taking of the said 100,000 feet of lumber, received from the plaintiff the said saw-logs for the purpose hereinbefore mentioned in that behalf, and before and at the said time of the taking of the said 100,000 feet of lumber, when in pursuance of the said bailment to them, the said M. and P., the said saw-logs had been and were in part worked up and manufactured by the said M. and P. into lumber as aforesaid, to wit: into the said 100,000 feet of lumber, being the lumber in the said declaration and part of the goods in the said third plea mentioned, and which said 100,000 feet of lumber, before and at the time of the taking of the same as aforesaid, was on the said lands and premises as aforesaid, and was about to be returned and delivered to the plaintiff by the said M. and P. when the said 100,000 feet of lumber was taken as aforesaid, wherefore the defendant, of his own wrong, took the said 100,000 feet of lumber, part of the goods in the said third plea mentioned."

The plaintiff as a fifth replication to the said third plea made a similar avowry as to the twenty-one saw-logs.

The defendant joined issue.

The case was tried at the Autumn Assizes of 1880, holden at Barrie, before Osler, J., without a jury, when a verdict was entered for the defendant.

In Michaelmas term following, this verdict was set aside and a verdict ordered to be entered for the plaintiff (46 U. C. R. 7).

The defendant thereupon appealed to this Court, and the appeal came on for argument on the 24th of January, 1882.*

McCarthy, Q. C., for the appellant.

Lount, Q. C., for the respondent.

The other facts; the points relied on and the authorities cited appear in the report in the Court below and in the present judgments.

January 22, 1884. SPRAGGE, C. J. O.—The case presents itself to me in a different aspect from that in which it is viewed and dealt with in the judgment of my brother Patterson. It is, of course, true that by our Provincial Replevin Act replevin will lie where by the law of England as it stood on the 5th of December, 1859, it would lie in England; and also where goods have been wrongfully taken or detained, and trespass or trover would lie in respect of such wrongful taking or detainer; but it does not appear to me to follow that, assuming that the cases cited shew that in trespass or trover a party having an interest only as part owner can recover only for the value of his interest, a part owner of chattels distrained upon for rent has no *locus standi* in Court to prevent the seizure and removal of chattels, in which he has such joint interest; and therefore I think that the cases cited do not assist us in the determination of the issue in this case.

I think this is apparent, when we look at what are the real relations of the parties. I assume for the present that the plaintiff and Matthewson were joint owners of the chattels distrained upon for rent due by Matthewson and R. D. Paterson. The right of distress for rent carries with it the right to remove the chattel from the place where it is

**Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

seized, and to sell it in case of non-payment of the rent. As put by Mr. Benjamin in his argument in *Ex parte Parke*, L. R. 18 Eq. 381, it is of its essence that you can take the thing seized and carry it away, and this appears to be adopted by Sir James Bacon, who says the right is "to distrain upon all or any of the chattels * * and to take them without process, without authority, other than that which the deed and the law gives to the distrainor, and to carry them away." The real position then of the distrainor is, as it appears to me, that of an aggressor, not necessarily a wrongful aggressor; but still an aggressor, and the position of the part owner is defensive. If that be their relative position, all that needs logically to be shewn by the part owner is that he has such an interest in the chattels as to entitle him to resist their being taken away; he need not shew more than this; he need not shew that he has himself a right to take away the chattels. His right as between himself and the distrainor is, that they be left where they are, and therefore his position is purely a defensive one. What results that position may lead to I will discuss presently. It is said, indeed, by Chief Baron Gilbert that in replevin both parties are actors. That of course must mean that they are so in the action itself, and that is not inconsistent with my idea of the relative position of the parties. The landlord takes the goods out of the custody of the agent of the part owner, and so is the aggressor.

The learned Judge who tried the case does not find whose property the chattels distrained upon were; but he negatives the plaintiff's claim that they were his sole property, and that is what as I read the second branch of his finding is what is meant by it. It is certainly all that is necessarily expressed by it. His finding is that the logs and lumber in question "had not been left on the demised premises under the circumstances and for the purposes stated in the third plea of the avowry—the fourth replication to the third plea." Turning to that piece of pleading, we find it stating in substance, that the plaintiff employed Matthewson

and Paterson, who were carrying on the trade of saw millers and manufacturers of lumber, as his workmen, for certain wages in that behalf, to work up and manufacture into lumber on the demised premises certain saw-logs of the plaintiff which he had delivered to them for that purpose; and that they should return the same to the plaintiff as soon as they should be so manufactured.

The learned Judge could not *consistently with the evidence* find broadly that the logs were not at the saw mill for the purpose of being manufactured into lumber. He only finds that they were not delivered to the saw millers by the plaintiff to be manufactured for him, and to be returned to him as soon as they should be so manufactured: and this is quite consistent with the other branch of his finding, viz., "that at the date of the distress the logs and lumber distrained on were the property of the tenant Mathewson, or the joint property of the plaintiff and Mathewson;" and his conclusion as a matter of law is: "I therefore enter a verdict for the defendant." That is, as I read the findings, these chattels were either the property of Mathewson or the joint property of the plaintiff and Mathewson. I do not find which. They were not the sole property of the plaintiff, delivered by him to the saw-millers for the purpose stated in his fourth replication to the third plea; and therefore the defendant is entitled to a verdict.

I do not know whether the learned Judge meant to say that whichever way the fact of ownership might stand the defendant was entitled to a verdict; or that the plaintiff's pleading being what it is, and the fact of ownership being what he found it to be, the defendant was entitled to a verdict. That at any rate is what we have to determine.

In the Court below the question of law discussed was, whether, assuming the chattels to have been, the joint property of the plaintiff and Mathewson, they were distrainable by the landlord of the premises, and the same question is discussed in the judgment of my brother Patterson. He agrees, and I think the point admits of no

doubt, that saw-logs the property of A. delivered by the owner at the saw mill of B. for the purpose of being sawn into lumber and delivered to A. are exempt from seizure by the landlord of B. by way of distress for rent.

In one of the alternatives presented by the finding as to the ownership, *i. e.*, sole ownership in Matthewson, there can of course be no possible question. The plaintiff could have no *locus standi*. The question arises upon the other alternative, and upon the pleading; and there is no finding upon the question of joint ownership; and so apart from the question of pleading, or rather perhaps of parties, the question is really a hypothetical one.

I think it convenient to take first the question of pleading and parties. Assuming for the present that the plaintiff and Matthewson were joint owners of the chattels, and that such joint ownership is in law a ground of exemption from distress, the cause of action stated is the taking and detaining by the defendant, the landlord, of certain chattels of the plaintiff. The only answer upon the question of ownership is that contained in the second plea: "that the said goods were the goods of the defendant and not of the plaintiff as alleged." It reads like a merely formal plea, not as intended to raise any question of joint ownership, and does not as a piece of pleading raise a question of joint ownership.

I confess I feel myself very much embarrassed by the finding upon the question of ownership taken in connection with the pleading. The finding negatives only sole ownership in the plaintiff, not joint ownership in the plaintiff and some third person, say in the plaintiff and Matthewson. If in fact there was joint ownership in the plaintiff and Matthewson, that should I conceive have been pleaded in abatement; as I understand from Chief Baron Gilbert's book on Replevin (p. 146), and the American cases of *Wright v. Bennett* 3 Barb. 451, and *D'Walf v. Harris* 4 Mason at p. 538.

If in fact there was joint ownership in the plaintiff and Matthewson, and if, there being such joint ownership, the

chattels were liable to distress for rent due by Matthewson and R. D. Paterson, then there may properly be judgment upon the present finding in favour of the defendant; but if the goods were not liable to distress in the event of such ownership, the question of ownership is material, and it is difficult to deal with the case upon the present finding.

The Court of Queen's Bench has dealt with the case as if one of the alternatives of the finding had been found absolutely. I feel difficulty in assenting to this as a proper course. Taking the case apart from the question of pleading, and assuming that the whole question was opened before Mr. Justice Osler as it was probably assumed to be at the trial, the difficulty still presents itself, that for aught that appears upon the finding of the learned Judge the sole ownership of these chattels was in Matthewson.

The finding being what it is, the plaintiff can succeed only upon the ground of joint ownership with Matthewson—a case not stated by him in any pleading and not the case to which he directed his evidence; and he did not ask for leave to amend, and from the course which the case took at the trial I do not suppose that he would ask for such leave; for the course that he took in evidence, as well as in pleading, was to establish sole ownership in himself, and in that we must take him to have failed.

Upon the general question the inclination of my opinion is, that if there was joint ownership in the plaintiff and Matthewson the chattels were not exigible for rent in arrear due to the defendant. I have but little to add to what I have already said upon that point. Much of the reasoning of Sir James Bacon in *Ex parte Parke*, L. R. 18 Eq. 381, applies to this case; without, however, this case being open to the observation made by the learned Chief Judge, that the conclusion to which he felt himself obliged to come in that case was against the common sense and justice of the case. I think that in a case of joint ownership between a tenant and a third person, such goods being on premises leased by the tenant, and being there for a purpose which exempts them from distress if they belong to such third

person, the common sense and justice of such a case would be that they could not be distrained for rent. The extraordinary remedy of distress for rent ought not, in my humble judgment, to be applied to new cases.

My brother Patterson deduces from the judgment of the Chief Judge in *Ex parte Parke*, that it was the joint tenancy of the land which enabled each tenant to say to the landlord "You must not distrain upon this land, which is my land, any chattels that belong partly to me for rent which I do not owe." But might he not say, "You must not distrain upon this chattel for rent. It is in the hands of your tenants for a purpose which exempts it from distress and it belongs partly to me; and the rent is not nor is any part of it owed by me." I think such answer would be a reasonable and just one, and a sound legal reason against the distress.

According to my view of the case the most satisfactory course would be to refer the case back to the learned Judge who tried the case, in order to his finding as to the property in the goods seized—not in the alternative, but absolutely. If this cannot properly be done—a point upon which I have not satisfied myself—I think there should be a new trial, without costs.

BURTON, J. A.—It is not necessary, in the view which I take of this case, to consider whether the plaintiff was entitled to any relief either by injunction or otherwise in respect of the seizure complained of, inasmuch as I fully agree in the view taken by my brother Patterson, that the plaintiff has not shewn that he had a right to take sole possession of the goods by an action of replevin.

The cases relied on for that position when rightly considered lead, I think, to the contrary conclusion.

No doubt if one of two joint owners brings an action of replevin against a stranger he would be entitled to recover, unless the non-joinder of his co-tenant were pleaded in abatement, and the bare fact that others are jointly interested with him in the property is no bar to the action.

If the defendant, however, can connect himself with the title through any of the co-owners, he can avail himself of the right which he has thus acquired in bar of the action.

One tenant in common of a chattel cannot maintain trover against his co-tenant who has taken sole possession, and if in the present case the defendant had acquired the interest of the co-owner it would, I think, be clear that replevin would not lie by the plaintiff against him.

Here the pleadings shew that Matthewson's goods were liable to distress. If, therefore, Matthewson had sued, alone the seizure would as regards him be a complete answer. Could he place himself in a better position by joining the plaintiff as a co-plaintiff? It appears to me that being disabled from suing alone, the same facts would constitute a bar when suing with others as co-plaintiffs. Here the plaintiff claims the entire property, but it is clear that as regards his co-owner the seizure was lawful, and I am unable to see by what right the plaintiff can in an action of this kind claim the sole possession.

Upon this short ground, therefore, I agree with my brother Patterson that this appeal should be allowed, and the rule *nisi* discharged, with costs.

PATTERSON, J. A.—There are several questions to consider in this case. There is first the question of fact, what was the plaintiff's interest in the goods? Was he sole owner of them, or was he only joint owner with Matthewson, one of the defendant's tenants, or were the goods Matthewson's and not the plaintiff's?

If this last question should be answered in the affirmative, the answer would of course be fatal to the plaintiff's case. If the plaintiff was sole owner or if he was part owner, the next question is, were the goods on the demised premises under circumstances which exempted them from liability to distress for rent due by the tenants?

These questions have been debated before us.

There is a further question which arises in case we hold the goods to have been the joint property of the plaintiff

and Matthewson ; and that is whether, under the circumstances, the plaintiff can assert, as he has asserted by replevying the goods, a right to the sole possession of them as against the landlord to whom the rent is due by Matthewson and his partner in the mill.

This question was not noticed in the Court below, and it has not been formally argued before us. It is involved in the consideration of the propriety of our attempting to dispose of this action upon the principles which governed the Chief Judge in Bankruptcy in deciding *Ex parte Parke*, L. R. 18 Eq. 381, on which case the judgment now in appeal was mainly grounded. We have to consider not only whether the same rules concerning partnership dealings and partnership property which were acted on by the Chief Judge apply to the joint ownership which may have existed between the plaintiff and Matthewson ; but also whether the very peculiar facts in the English case are so nearly parallel with those we have to deal with as to bring this case within the principle on which, in *Ex Parte Parke* it was considered that the landlord ought to be restrained from enforcing his distress ; and we have further to say whether it follows that because the distress may under the circumstances be open to the same objections that were given effect to in the Court of Bankruptcy, the landlord may therefore pursue the common law remedy of replevin upon which he now insists.

This last question was not so distinctly advanced in the argument before us as to enable us to say that we have had much assistance upon it from the counsel for either party. It is, however, involved in the point made by Mr. McCarthy when he denied that the decision in the Court of Bankruptcy was an authority that should govern this case ; and it is a question that we must decide before we can hold that the judgment given at the trial for the defendant was properly reversed.

The plaintiff replevied the goods, claiming that they belonged to him, and that they were exempt from distress because they were on the demised premises to be worked

up or manufactured by the tenants in their trade as millers, and to be redelivered to the plaintiff.

The saw-logs were taken to the mill during the winter of 1879-80; the millers began to saw them in March or early in April, 1880; and the defendant distrained the manufactured lumber and such of the logs as remained unsawn on 3rd May, 1880.

If the facts could be taken to be as thus put forward by the plaintiff, it would not be necessary to spend much time in discussing the case. It has not been contended before us that the rule which applies to protect from distress goods delivered to a workman to be dealt with in the course of his trade is inapplicable to the case of logs delivered at a saw mill to be made into boards; and no question can be made of the correctness of the judgment of the Court below upon that point. Neither is there any foundation in the evidence for supposing that the time during which such of the goods as consisted of sawn lumber had remained on the premises was unreasonably long, or longer than, in the ordinary course of the business, the lumber of any customer who brought his logs to the mill would remain there.

But the defendant asserts that the purchase and sawing of the logs was a transaction in which the plaintiff, if he had any interest as owner of the property, had it only in association with Matthewson; and that the lumber and logs were not at the mill under circumstances which created the privilege claimed for them.

These questions of fact and the evidence bearing upon them were so fully and carefully stated by the learned Judge at the trial in the judgment delivered by him, that I cannot do better than read his words as reported to us, taking also his own statement of his findings. I do this, reading the judgment at length, because it is the most ready and the most accurate mode I can adopt; and for the further reason also, that in the statement of facts given in the report of the judgment now in appeal in 46 U. C. R. 7, the finding that the goods were not on the demised

premises under the circumstances and for the purpose pleaded has been overlooked by the reporter, and is not noticed in the judgments delivered.

I now proceed to read Mr. Justice Osler's judgment.

"The plaintiff's contention is, that the logs, the subject of this suit, were delivered by him, being his own property, at the saw-mill of Matthewson & Paterson, to be manufactured into lumber in the course of their trade, and were therefore exempt from distress.

"The defendant maintains that the logs were the joint property of Matthewson and the plaintiff, and that as such he had a right to distrain them.

"(1.) The plaintiff's account of the matter is, that last fall (1879) Matthewson proposed that they should buy logs together and put into the mill: that he at first refused, 'having neither time nor money to go into it:' that on Matthewson saying he could pay some money about March, 1879, they arranged that the plaintiff should go and buy up logs on his own account, advancing what money he could as he went along, and pay the balance of any liability he might incur. About the 15th March, if Matthewson could get money by that time, he was to become the owner of the logs, so far as the money could go, at the same price the plaintiff had paid for them. If not he was to cut them at his mill at the rate of \$2.00 per thousand feet. There was nothing said as to the quantity of logs to be got out, nor how much for his time and trouble—although the latter was spoken of—the plaintiff was to be paid.

"Matthewson said he never had any interest in the logs: that the agreement was, that if he could get money, the plaintiff and he were to get out 200,000 or 300,000 logs on joint account; that it was first spoken of in February last (1879), and was not talked of in the previous fall: that it never had been agreed that Paterson should get out logs in the winter, and that if he Matthewson could pay for them in the spring they were to become his, and that nothing had been said as to paying Paterson in that event for his time and trouble in getting them out.

"Afterwards and on re-examination he said that several times in the fall he and Paterson had been talking about logs, and if he had been able to raise the money he was to

go in with him. He raised no money. Paterson had then all his logs bought.

"(2.) As to the payments alleged to have been made for the cutting, the plaintiff said that he had paid in cash \$200 in all, and had besides done work for the tenants to the amount of \$14. He produced six receipts—the earliest dated 16th April, 1880, the latest 3rd May. He paid \$50 to Matthewson out of money he had borrowed from the bank in February or March, but took no receipt for it. He had never received a bill for the cutting. The receipts did not show the dates at which the money was paid Matthewson. That about the first of March he got part of the proceeds of a note discounted at the bank of Toronto, made by himself, and indorsed by the plaintiff, but not as much as \$50: that all the money for the cutting was paid before a log was cut: that his partner, R. D. Paterson, signed all the receipts, and gave them as the money was paid.

"R. D. Paterson, Matthewson's partner, swore that every dollar of the money for cutting the logs had been paid to him personally, and none to Matthewson, that the receipts were in his handwriting, that the money was paid at the different dates shewn by the receipts, and the receipts given at the time, and that none of the money had been paid before the 1st of April. He remembered particularly that the sum of \$4, mentioned in one receipt, had been paid to him in a \$4 bill, and that it had not been paid (as his partner had sworn) on an order. He afterwards admitted that one receipt had been given for moneys paid by the plaintiff to workmen for wages. He only knew from what his partner Matthewson had told him that they were cutting the logs for the plaintiff at two dollars per thousand feet. He did not know the bargain between them. Had heard a rumour about the first of the year that plaintiff and Matthewson were to get out logs in partnership.

"For the defendant it was sworn by James S. Carnegy, manager of the Bank of Commerce at Barrie, that some time in March last Paterson (the plaintiff) and Matthewson came to the bank, and the latter applied for an advance of \$200 to make a payment on account of logs, on a note which Paterson was to indorse. Carnegy said he would consider about making the advance if Paterson would also become security for a note of Matthewson's already overdue in the bank, and for the rent which was already

secured by a chattel mortgage ; offering, in the event, to assign the mortgage to Paterson. Paterson refused, saying that they could get the money elsewhere. He said that the bank need not be afraid of Matthewson, as they were getting out logs together, and as soon as they could realize on the lumber there would be enough to pay the rent. Carnegy advised them to think over his proposition. They went out and returned soon after, and Paterson definitely refused to indorse, repeating the statement that they were getting out logs together, and that there would be enough coming to Matthewson to pay the bank claim.

"James L. Burton, who was present at both the conversations, corroborated almost literally Carnegy's statements.

"The plaintiff and Matthewson deny that these statements were made, but their accounts of what they say did take place at the bank are not consistent, Matthewson alleging that it was proposed there that the bank should advance \$300 or \$400 on Paterson's indorsement, which the latter was willing to give on account of other logs (not the plaintiff's) which Matthewson had bought or might buy—while Paterson denied that anything of the kind had occurred at all. The plaintiff says that the interviews at the Bank of Commerce took place in the month of February ; Matthewson at one time said they were on the 11th of February, and at another that they were about the 1st of March, the same day on which the money was afterwards obtained at the Bank of Toronto. Carnegy says he thinks they were in March, though he will not swear positively.

"[The witnesses and parties were put out of Court during the trial.] The evidence of Matthewson and R. D. Paterson was given in a manner which alone would almost disentitle it to credit. The plaintiff's was not so much open to objection on that score, though it did not impress one favourably. Looking at the contradictions and inconsistencies in the evidence in support of the plaintiff's case, and the evidence of the witnesses Carnegy and Burton, who appeared to me to be truthful witnesses, I am obliged to come to the conclusion that the plaintiff's case fails.

"It was urged that if the interviews at the Bank of Commerce had occurred in February the statements said by Carnegy and Burton to have been made there by the plaintiff were not entirely inconsistent with his contention, as he might at that time, though inaccurately, have spoken of Matthewson as being jointly interested with him in the

logs. I cannot, however, accept this suggestion in the face of his absolute denial of the conversation sworn to by these witnesses; and whether the interviews were in February or March they were prior to the time at which, according to the plaintiffs own account, Matthewson would have the right to repay him his advances.

"There is no evidence that Matthewson had become interested in any other logs in February or March, nor was any reason suggested why the plaintiff should rather be willing to become security (as Matthewson says) for the purpose of raising money to enable him to buy other logs, than for the purpose of repaying the moneys already advanced by the plaintiff for the logs already bought, and which were to become Matthewson's property in payment of such advances. I think the latter was the real object of the discount obtained at the Bank of Toronto, the whole of which Paterson got, and none of which was expended in the purchase of other logs. That discount was, I am satisfied, obtained at the Bank of Toronto on the same day that it had been refused at the Bank of Commerce. None of the lumber had then been cut, and the only assignable reason, in my opinion, for getting it, was to enable Matthewson to pay Paterson and become the owner or part owner of the logs. I am unable to attach any value to the receipts.

"I find that at the date of the distress the logs and lumber distrained on were the property of the tenant Matthewson or the joint property of the plaintiff and Matthewson, and had not been left on the demised premises under the circumstances and for the purpose stated in the third plea to the avowry—the fourth replication to the third plea.

"I therefore enter a verdict for the defendant."

There is a curious uncertainty about the facts to which we are to apply the law, that is rather embarrassing.

One fact found by the learned Judge at the trial, and the only one found positively, is, that the logs had not been left on the demised premises under the circumstances and for the purpose pleaded by the plaintiff; in other words, he finds that they were not there to be worked up and manufactured into lumber by the tenants in the way of their business and trade, and the manufactured lumber returned to the plaintiff.

He does not find that the goods were to any extent whatever the property of the plaintiff; the finding on that point—the effect of which was that, if he had any interest in them, it was only a joint interest with Matthewson—being apparently considered as negating with sufficient certainty the title alleged by the plaintiff in his pleading, particularly as the facts on which the privilege was claimed were also negated.

Nothing is said in the judgments delivered in the Queen's Bench to indicate dissatisfaction with the learned Judge's view of the evidence; and from the details of it given by him in the judgment which I have read, it was evidently of such a character as to leave the plaintiff without any plausible ground for asking for a decision more favourable to him than that at which the Judge arrived. Yet in the Queen's Bench the judgment proceeded upon a fact which was not found at the trial, namely, that the plaintiff was part owner of the goods; and while no allusion is made to the important finding that the goods were not upon the demised premises for the purpose pleaded by the plaintiff, the judgments assume that they were there for that purpose.

The questions proposed to be dealt with by the Court, and the view of the case in which the consideration of them was approached, are stated by Mr. Justice Cameron at the commencement of his judgment. His first remark is, that "The evidence, in the opinion of the learned Judge, was conflicting as to whether the tenant Matthewson was not jointly interested in the logs with the plaintiff, and he adopted the view that Matthewson was interested therein, and entered a verdict for the defendant."

This is the only reference to the decision at the trial, and it is on comparing it with the judgment which I have already read that the difficulty arises, which I have pointed out, in attempting to reconcile what the Judge himself says his finding was with what the Court seems to have understood it to be.

Then Mr. Justice Cameron proceeds to say:—"Neither

at the trial nor on the argument of the rule did the counsel for the plaintiff present the question—whether the logs having been delivered to Matthewson & Paterson in the way of their trade, to be sawed and manufactured into lumber, they would be exempt from distress, though Matthewson had in fact been interested therein jointly with the plaintiff; and on the question being asked by the Court the defendant's counsel answered that case was not presented on the record, the plea to the defendant's avowry merely alleging the logs were the logs of the plaintiff."

This answer of the defendant's counsel seems to have put the matter correctly: that is, it gave a satisfactory reason, as it strikes me, why the suggested question had not been raised at the trial by the defendant. He had effectually answered the case made by the plaintiff. If I might venture to surmise a reason why the plaintiff's counsel did not raise it on the argument of the rule, apart from the fact that he had not raised it at the trial, I should say that the findings of the learned Judge at the trial furnished a very sufficient reason—particularly the adverse finding as to the purpose for which the goods were on the demised premises.

Then the questions to be dealt with are thus put:—"The decision of the case depends upon the correct answers to be given to two questions. First—Is the business of sawing lumber for hire such a trade or business as exempts the property of strangers, brought to the premises where the business is alleged to be carried on to be converted into lumber, from distress for rent? * * Then upon the facts, as there is no doubt the logs were taken to the saw-mill to be converted in the due course of the business of the mill into lumber, either for the plaintiff alone or for the plaintiff and Matthewson, the first question must be answered in favour of the plaintiff. As to the second question the same answer must be given, assuming that the view of Mr. Justice Blackburn, as above set out is correct, that the privilege is given to the person carrying on the trade. The logs and the produce thereof,

in the shape of lumber, having been taken to the premises of Matthewson and Paterson in order that their business might be exercised thereon, became exempt from distress; that is, the plaintiff's goods, or goods that the plaintiff was interested in, having been taken to the demised premises for the purpose aforesaid, became at common law exempt or privileged from distress."

This last proposition seems too broadly stated to be at once assented to. It is put, as I understand it, as a deduction from the conclusion that logs brought to a saw-mill to be sawed in the course of the trade of the millers for a customer, and the produce of them returned to the customer, are exempt from distress, a proposition to which I fully assent. If the goods were the plaintiff's there would be no question of its correctness; but if he was only interested in goods of which the tenant who owed the rent, and whose trade it was that was being exercised upon the goods, was also owner, the soundness of the proposition is not so obvious, and the authorities alluded to do not touch that aspect of it.

The only other authority quoted is *Ex parte Parke*, L. R. 18 Eq. 381. That was an appeal to the Chief Judge from the order of a County Court Judge, who had granted an injunction to restrain mortgagees to whom the mortgagors had attorned tenants from proceeding upon a distress. The circumstances were rather peculiar. The mortgagors, Potter and Ferrige, who were partners in the business of brick making, had attorned tenants each in respect of an undivided moiety of the premises, but each for a separate sum by way of rent. They were therefore joint tenants of the premises on which as partners they carried on their business, but the debt of each of them for rent was his separate debt. The landlords issued a separate distress warrant against each of the partners, and distrained bricks and machinery, which were partnership property, upon the demised premises. The injunction was granted upon the application of a receiver appointed in the bankruptcy of Potter and Ferrige, who were adjudged bankrupts after the seizure under the warrants.

Sir James Bacon, C. J., spoke of the case as ridiculously technical, saying :—" If I could introduce into my decision, or if I could enter into the contemplation of what are called equitable principles or principles of common justice and common sense, I should have no hesitation whatever in saying that both these distresses were perfectly good distresses upon the chattels which were taken. But the law forbids me : the contract and the conduct of the parties prevent me from saying so."

The decision turned upon the peculiar situation in which the debts and the tenancy stood. It was impossible to seize under the warrant against one—say against Potter—any chattel which did not belong to Ferrige as much as to Potter, and equally impossible to find one on land which was not the land of Ferrige as much as it was the land of Potter. While therefore Potter could not have objected to the seizure for the rent which he owed of any one of the chattels, because he could not have said it was not his or that it was not on his land, Ferrige could object to the seizure of the same chattel for Potter's rent, because the chattel was also Ferrige's and was on his land.

In this way a practical exemption arose ; but it did not arise from any principle, but, as observed by the Chief Judge, from a merely technical rule. Discussing the position that the landlord could not say that any chattel belonged to either partner to the exclusion of the other, the Chief Judge made the observation that being partnership property, and so, as between the partners, subject to the partnership debts and to the accounts between the partners, it might turn out that one of the partners, although in law an owner, had in reality no property in whatever chattel might be in question ; but I do not understand him to have touched that subject for any other reason than as illustrating the general ground of his decision, which I think I have correctly stated.

Now while I think that the conclusion which the Chief Judge came to, reluctantly, as he said, because it was directly against the common sense and justice of the case,

was the proper conclusion under the technical principles which had to be followed, I venture to think also that the case has very little application to the facts before us. Leave out the factor of the joint tenancy of the land, which enabled each tenant to say to the landlord "You must not distrain upon this land, which is my land, any chattel that belongs partly to me, for rent which I do not owe," and you remove the foundation of the decision. No such fact enters into the case before us.

But if, without reverting to the apparent conflict between the facts as found at the trial and those reasoned upon by the Court, we take the case to be that the plaintiff was part owner of the chattels, and that they were at the mill under circumstances which, if he had been sole owner, would have exempted them from liability to distress, we may perhaps find that in one aspect the case approaches some of the positions discussed in *Ex parte Parke*; at least if we assume, which I do, that the privilege which would have attached in case the chattels had been the sole property of the plaintiff would still apply to protect his undivided interest in them.

By virtue of that privilege he could insist that as against him the distress was wrongful, and so would be practically in the position of Ferrige when he disputed the right to seize the bricks for Potter's rent.

But unlike Potter who, being also tenant of the land as well as co-owner of the bricks, could resist the seizure for the rent due by Ferrige, this tenant Matthewson had no pretext upon which, as far as I have been able to satisfy myself, he could say the lumber or logs were wrongfully distrained.

He had no privilege. He was manufacturing the boards upon his own premises, and he owed the rent for those premises. There is nothing in the case of *Ex parte Parke* that can be used as authorizing the contention that he could have resisted the distress, and no case has been cited to us which goes that length. Then the landlord having rightfully as against Matthewson, seized the goods which

were in the actual possession of Matthewson, became, as I understand the law, tenant in common with the plaintiff. What the plaintiff asserts in this action is not his right to an undivided interest as against the defendant, but his right to the sole possession of the goods. This also is a position for which no case which has been cited to us affords authority.

By the Replevin Act, R. S. O. ch. 53, replevin will lie wherever goods have been wrongfully distrained under circumstances in which by the law of England on 5th December, 1859, replevin might have been made; or, in case goods have been otherwise wrongfully taken or detained, the owner or other person or corporation capable of maintaining an action of trespass or trover for personal property may bring an action of replevin for the recovery thereof.

Now while there has been a distress, or a taking or detention which is wrongful as against the plaintiff, it is wrongful only as to his undivided moiety. But he is not content with claiming a moiety; and replevin is not the appropriate action for obtaining restitution or damages in respect of an undivided interest.

Let us consider what action the plaintiff could have maintained if the goods had been sold by the landlord.

If the sale could be treated by him as a conversion of the goods to the use of the landlord, what would be the fate of an action of trover?

If such an action were brought by the plaintiff and Matthewson jointly, I apprehend it could be defeated by shewing that as against Matthewson the sale was rightful. *Brandon, et al. v. Scott*, 7 E. & B. 234 was decided against the plaintiffs on the principle which is shortly expressed by Crompton, J., thus: "The principle is, that several cannot sue at law jointly, unless each one is in a position to sue. The decisions cited establish that where a person is disabled from suing alone, he cannot enable himself to sue by joining others as co-plaintiffs."

If the plaintiff sued alone in trover, or if, waiving the

tort, he sued for money received to his use, he could only recover the value of his own interest—not the whole value of the goods. Thus in *Dockwray v. Dickenson*, Skin 640, it is said: "But the party may make a tort joint and several; and if a man bring trover for a ship, and upon the evidence it appears that he has but the sixteenth part of it, this is good, and the interest of the others may be given in evidence in mitigation of damages." And the note of *Blackborough v. Graves*, 1 Mod. 102, reads thus; "Upon a case moved, Hale, Chief Justice, said, that if a tenant in common bring a personal action without his fellow joining in the suit, the defendant ought to take advantage of it in abatement; but if he plead not guilty, it shall be good; but then the tenant shall recover damages only for a moiety."

In *Addison v. Overend*, 6 T. R. 766, and *Sedgworth v. Overend*, 7 T. R. 279, the Court sustained the right of two part owners of the same ship to recover in separate actions of trover, each in respect of his own share.

One tenant in common of a chattel cannot maintain trover against his co-tenant who has taken sole possession of the chattel: *Holliday v. Camsell*, 1 T. R. 658; and there are authorities against the right of a tenant in common of goods to treat a sale of them by his co-tenant as a conversion, inasmuch as his title is not displaced by the wrongful sale.

In *Mayhew v. Herrick*, 7 C. B. 229, it was so held; and therefore an action of trover by the assignee of B., a bankrupt, against an officer of the Palace Court, who under a *fi. fa.* against A. had sold partnership goods of A. and B. to various purchasers, who carried them away, failed.

The same point was involved in *Holliday v. Camsell*, 1 T. R. 658, because that action of trover was not against the tenant in common only, but was also against a stranger to whom he had delivered the chattel.

In *Morgan v. Marquis*, 9 Ex. 145, one of two tenants in common of goods committed an act of bankruptcy. The defendant, by direction of the solvent partner, sold the

goods. It was held that the assignee of the bankrupt partner could neither recover under a count for money had and received, nor maintain detinue for the goods.

Broadbent v. Ledward, 11 A. & E. 209, in which the plaintiff, who was a trustee and member of a club, was allowed to recover in detinue for pictures of which other members, who were not joined as co-plaintiffs, were joint proprietors, was against a mere wrongdoer. The only plea, except *non detinet*, was that the pictures were not the pictures of the plaintiff. The case is not an authority for the present plaintiff's right to replevy, a sufficient distinction being found in the circumstance that in *Broadbent v. Ledward*, the defendant did not claim in privity with or under any claim of right against any one of the co-owners.

The case of *Mason v. Farnell*, 12 M. & W. 674, is another of the same class. It was there held that in an action of detinue the defendant could not, under a plea of not possessed, give evidence of a right in himself to the goods in common with the plaintiff. *Broadbent v. Ledward* was cited by Alderson, B., as deciding that a person entitled to a share of a chattel might maintain detinue; and I apprehend that where the action is against one who is a stranger to the title to the goods, there is no doubt that, unless the nonjoinder of his co-owners were pleaded in abatement, the action would always lie by one part owner. There is an American case, *Wright v. Bennett*, 3 Barb. 451, in which the distinction is very well pointed out by Allen, J., who delivered the judgment of the Supreme Court of the State of New York. That was an action of replevin charging a wrongful detention of goods, but not complaining of the original taking. It was brought under a statute which made the rules which governed actions of detinue applicable to this form of the action of replevin. The learned Judge, after stating the doctrines concerning pleading the non-joinder of plaintiffs in abatement in actions *ex delicto*, and referring to *Broadbent v. Ledward*, remarked, respecting the case before him: "The plaintiff as one of the joint owners of the property is entitled to the possession as

against a stranger, in which position the defendant stands, as he does not connect himself with the title of the other owners who have been omitted as plaintiffs, and there is great propriety in holding him to his plea in abatement, if he desires to avail himself of that omission * * * If the defendant can connect himself with the title through any of the owners, he can avail himself of the rights which he has thus acquired, in bar of the action; but, as a stranger, there is no good reason why he should be permitted, by a technical defence, to defeat the claim of a person entitled to the possession of the property as against him."

The rules of pleading in replevin are very fully set out in Comyn's Digest Pleader, 3 K, 12, 13, 14. No useful purpose would be served by discussing them more at length, because in this case the defendant has placed his case fully upon the record. He avows taking the goods under distress for rent against his tenants. The plaintiff has to assume the onus of displacing this defence, which is true in fact. This he attempts to do by alleging property in himself and the exemption of the goods, as his property, from distress. The question is whether he has maintained these allegations to an extent sufficient to entitle him to maintain this action.

Nothing therefore turns on the pleadings. The question of pleading is only referred to as aiding to illustrate the law touching the right of one in the plaintiff's position to replevy. But, in connection with this, and as an illustration of the law, I may be excused for quoting a short passage from Gilbert on Replevin, p. 146: "If the defendant pleads property in the plaintiff and J. S., then the plea is in abatement of the replevin, as it is in other actions; for though it admits a right of deliverance in the plaintiff, yet it does not allow it by a writ under the present form; but gives a better writ to be brought by the plaintiff and J. S. But here the plaintiff ought to make a consuance; because this plea not disaffirming the property, it leaves a right in the plaintiff to have his beasts, without such consuance be made."

This seems to put very nearly the present situation as I understand it. If the defendant had pleaded that the plaintiff did not alone own the property, but owned it only jointly with Matthewson, and avowed (an avowry and not a cognizance being appropriate when one defends in his own right) the taking as a distress for rent due by Matthewson, he would have done what I understand the learned Chief Baron to point to in the passage I have read. He would have shewn a good reason why the action should abate; and it is only repeating what I have been dwelling upon so long to say that he would also, in my judgment, have shewn a good answer to a writ in which Matthewson should be joined with the plaintiff.

It will not be overlooked that the test given by our statute of the right to bring replevin, by reference to the right to maintain trespass or trover, only applies where the wrongful taking or detention has been *otherwise* than by distress, and that when goods have been (as in this case) *distraigned*, replevin can only be brought under the Act where under the law of England on 5th December, 1859, replevin could have been brought. This consideration would have been effectual against an appeal to the Replevin Act to assist the present plaintiff; but, apart from this, the reference to trespass or trover could not aid him, inasmuch as the plaintiff could not in either of those forms of action have recovered the whole value, but only the value of his own interest in the goods.

To recapitulate:—

I hold, that in order to warrant the setting aside of the verdict for the defendant and the entry of a verdict for the plaintiff, the findings of fact by the learned Judge at the trial ought to have been shewn to be erroneous. I understand the judgment appealed from to have proceeded upon a different conception of the facts, but without any express finding the grounds of which can be compared with those acted on and explained in his judgment by the Judge at the trial. I think the difference important upon both questions of fact—the ownership of the goods

which was not found to be in the plaintiff, and the purpose of their being at the mill, which was found not to be that which was pleaded. If the appeal turned upon this point I should be inclined to decide that the verdict ought not to have been disturbed.

But taking the facts to be those on which the judgment in review proceeded, I think the verdict could not properly be disturbed by merely establishing that the plaintiff had rights which he might have enforced by injunction, or in respect of which he might have recovered by way of damages the value of his share of the property. It was necessary to go further, and shew that he had a right to take sole possession of the goods by this common law action of replevin; and I think that as against the defendant no such right has been shewn.

I am therefore of opinion that we should allow the appeal with costs, and that the rule *nisi* should be discharged.

MORRISON, J. A., concurred.

Appeal allowed, with costs. [Spragge, C.J.O., dissenting.]

with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

We are referred to a number of cases decided upon the corresponding provision in the Imperial Act; and to some decisions in our own Courts. The cases are not uniform—they are not so, even taking into account the varieties of expression in the different wills, which the Courts had to construe. I take the proper course to be, to read the will assuming that the testator had read it immediately (using the word as meaning very shortly) before his death, and that, seeing nothing in it that he desired to change, and knowing that it would be read as the then expression of his will and intention, he had chosen to leave it as it was, although, if the rule of construction had been otherwise, and his will was to be read as expressing his intentions at its date, he would, when reading it shortly before his death, have made alterations which—the rule being as it is—he judged not to be necessary. This of course can only be where a contrary intention does not appear by the will itself. In some of the cases I venture to think that the learned Judges expounding wills have not put themselves in the place of the testator, and read as with his eyes the wills before them, attributing to him a knowledge of the rule of construction established by our law. However that may be I confess that I have derived but little aid from a perusal of the cases, partly probably from my own fault and partly because none of them accord with this will and its circumstances.

It is indeed impossible to construe, or rather to apply, this will without a knowledge of circumstances. I have stated the circumstances of the two lots in question having been sold and conveyed by him before he made his will; and here we must refer particularly to the language of the statute. It does not say that all the real and personal estate of the testator referred to in the will of which he died seized or possessed shall pass—that would in some

cases carry more than was intended: but in that part of the clause which speaks of the subject matter devised or bequeathed the words "comprised in it" are used, and therefore, while reading the will as speaking from just before the death of the testator, we have still to see whether at that date the subject matter which is in question was comprised in it or not. In this case the question is whether it is comprised in it or excepted from it. The general devise is the south 80 acres of a certain lot of land; the exception is of "so much thereof as I may have sold and conveyed." I cannot agree that there is anything in the use of the word "may" in this sentence. It means simply so much thereof as I have sold and conveyed, and can mean nothing else. It is to be observed that the testator uses different language when speaking of the rest of lot 12, other than the south 80 acres. As to that his language is so much of it "as I may die seized and possessed of." As to the 80 acres it is excepting so much thereof "as I may have sold and conveyed." He may have meant the same thing in both; and at the date of his will he probably did; and yet at the date of his death he may have chosen to let the will stand as it was in the belief that the language used as to each block of land expressed his then real intention. At the date of his death the fact remained that he had sold and conveyed village lots 1 and 2. It is true that they had been reconveyed to him; and his language applied first to the other part of lot 12 would have sufficed, if applied to the 80 acres, to make the village lots pass by the will, but the language as to that part of the land comprising the village lots is different. In truth that part of the testator's land never was comprised in his will; and could not be without a material alteration of the language used. We must not forget that the will of a testator is to be interpreted by the language used in it. I have given my construction of the will interpreted by itself and by its surrounding circumstances; but in the view that I take of the other branch of the case it is not material whether the lots in question did or did not pass under the will. Upon

that branch of the case therefore my conclusion is that the village lots did not pass to Nathan by the will.

The other branch of the case is this. We have not before us a copy of the will. I infer from the pleadings that it contains no general devise, but only the specific devises referred to in the bill and answer.

The plaintiffs claim that their father, the testator, was seized of the absolute/beneficial interest in the land in question. Nathan, on the other hand, contends that the conveyance made to his father ought to have been made to himself; that he, not his father, was the purchaser of these lots from George his brother, who was the then owner, subject to a mortgage upon these and other lands to Peter Wood, and that he paid George the whole of the agreed consideration out of his own moneys. He further sets up that the hotel buildings placed upon the lands were built with his moneys, and in order to establish his claim that all these moneys were his own, he states in his evidence and gives the evidence of other witnesses also to prove that the business carried on in his father's name was in fact his business and not his father's; that it had been transferred to him by his father some ten years before his death. This contention of Nathan as to the business and the moneys derived from it belonging to Nathan, and not to his father, is distinctly negatived in the judgment of the learned Judge before whom the cause was tried, and I think it is impossible to say that he has come to a wrong conclusion. I gather from the evidence that the relation of father and son was that of owner and manager respectively; and that it continued to be so up to the death of the father—Nathan trusting that his father would provide for him by his will; that, to use their own words, he would make it all right in the end. And the father did not disappoint Nathan, for the latter says: "After he had made his will he said he had made me all right, and when I had read the will I found that he had made me all right."

In the meantime the property and the earnings from it

were the father's, Nathan having only a reasonable expectation that he would benefit in the end by the services that he was rendering to his father.

The learned Judge says in his judgment that the contention of absolute ownership set up by Nathan seems to be "absolutely necessary to sustain his defence, for if this were not the fact, it was manifest on the evidence that the money he alleged he had paid to and for George, as well as the moneys expended in building the hotel, were his father's moneys and not his own." I cannot quite agree in all this; for taking the fact to be that the moneys used for these several purposes were the moneys of the father, it does not follow that Nathan could have no interest in the two lots in question.

The evidence I think establishes clearly that Nathan, not his father, was the purchaser from George of these two lots. There was no contract of sale and purchase between George and the father. There was such contract between George and Nathan, and that contract was spoken of and recognized between George and the father in the presence of Peter Wood, the mortgagee, on the occasion of those three parties meeting in Hamilton. George went to the meeting on that occasion in the expectation that the funds that he had at his disposal were sufficient to pay off the mortgage. They were found to fall short by the sum of \$375. Wood the mortgagee was content to accept the note of the father for that amount; and the question arose how the father was to be secured, when Wood suggested a conveyance of the two lots to the father for that purpose. The note was given, and the lots conveyed by George to the father.

Some things appear clear from this evidence. One is that what was done was not intended to make the father the purchaser of the lots, or to change at all the relative positions of George and Nathan as vendor and purchaser: another is, that the father did not intend to give this note or to pay the amount for the benefit of Nathan, but that his position should be that of a secured creditor in case he

paid the amount; and of a surety with a security over in the meantime.

It results from this that he took a redeemable interest in the two lots, and that it would have been a fraud on his part if he had claimed to hold them as his own absolute property. It is true that there was no writing, but we have the authority of Lord Justice Turner, in *Childers v. Childers*, 1 D. & J. 493, that such a case is not within the Statute of Frauds; and the same learned Justice held the same view in *Lincoln v. Wright*, 4 D. & J. 22, a case often referred to, and followed in several cases in our own Courts. In both these cases Lord Justice Knight Bruce decided upon other grounds, without however expressing any dissent from the opinion of Lord Justice Turner. *Davies v. Otty*, 35 Beav. 208, was a decision by Lord Romilly substantially to the same effect. In *Haigh v. Kaye*, L. R. 7 Ch. 469, before Lord Justices James and Mellish these three cases were referred to with approbation and the case in judgment was decided upon the same principle. I have ventured in one or two cases to express difficulties that I felt in assenting to the soundness of the principle, but it is a principle affirmed and acted upon over and over again, and cannot be questioned here.

There is indeed another principle also which applies to this case. George altered his position upon the faith of the representation virtually made by the father that he would hold the land conveyed to him by way of security only, and exposed himself to a claim and probably to a suit on the part of Nathan for non-fulfilment of his contract; and that representation the father was bound to make good.

If I am right upon these points the father had not since his sale to Hore in 1855 any title to these lots except as a security for money—in 1877 as a security or indemnity for \$375.

I am satisfied from the evidence that he intended no fraud upon Nathan. His conduct and his language during the progress of the building shew this; and they shew

this important fact also, that he was cogniza of the fact that his own moneys were being used by Nathan in the erection of the building. I say his own moneys, because the learned Judge has negatived, I think rightly, the claim of Nathan that they were his moneys. I say therefore that the father knew that his own moneys were being so used; and I think it is a proper inference from the evidence that he did not object to it.

Whether he intended to hold Nathan to account for these moneys or intended them as a gift to Nathan we are not informed. We have not before us the materials for deciding that point, nor is it a point in issue. The will of the testator might possibly help to a solution of the point, but we have before us only portions of the will, and they throw no light upon it. In this suit we cannot properly express any opinion upon it.

The decree declares that the plaintiffs and Nathan Vansickle are entitled to the two lots in question as tenants in common, and directs a sale. In that the decree is in my opinion erroneous, for the reasons that I have given.

The question that remains is, whether we can properly give any relief to the plaintiffs upon this bill.

Nathan, it is mentioned incidentally in the evidence, is an executor of his father's will, whether sole executor or not does not appear. But the bill is not filed against him in that character, and the allegations as to the application of moneys, in paying purchase money to George, and in putting up the buildings on the lots, are made *alio intuitu*, namely as evidence that the lots were purchased by and belonged to the father, in which case Nathan would of course not have to account for them.

In the other case, that of Nathan being the purchaser, he may or may not have to account for those moneys. That would depend upon facts that are not before us in this case. I think we cannot do otherwise than dismiss this bill—the question is, whether with or without costs. Nathan has rested his defence very largely upon allegations as to the ownership of moneys, upon which allega-

tions the finding of the learned Judge is against him, and which allegations are not supported by any reasonable amount of evidence; they are, looking at all the evidence, simply untrue. I should be content to dismiss the bill without costs; or, to dismiss it with costs excepting the costs of the evidence, as to which each party to pay his own costs.

The dismissal should be without prejudice to any action the plaintiffs may be advised to bring in respect of the moneys expended in payment of purchase money, and in the erection of buildings on the two lots in question; and if Nathan be an executor of the testator Benoni Vansickle, the right of the plaintiffs to file a bill for an account will of course not be affected by our judgment in this case.

I find it noted in my book, as stated by Mr. Osler, that the will contains a bequest of the residue of personalty to Nathan. Taking that to be so (we have not, as I have said, a copy of the will) the case is reduced to the one short question, whether the father was a purchaser of the two lots from George, or took a conveyance of them in order to indemnify himself in regard to the \$375 note. If the latter, and if the residue of personalty be equal to the moneys expended by Nathan in the payment of purchase money to George and the erection of the hotel buildings on the lots, there would to be an end of all question between the parties, inasmuch as Nathan if brought to account as executor in respect of these transactions would be simply accounting to himself.

In my view of the case the real question between the parties—that which is the turning point in the case—has been touched but slightly in the argument, and not at all in the judgment.

In my opinion the appeal should be allowed.

BURTON, J. A.—The account given by Nathan Vansickle of his purchase of these lots from George for an indefinite sum—viz.: the amount of George's liabilities, of the extent of which neither was aware, is a very extraordinary one; and

I should incline to think with the learned Judge below, that whatever the transaction was, he was acting as the agent of the father, and that the moneys paid were the father's moneys. But were it otherwise, and the father held the land subject to the advances as trustee for Nathan, the plaintiffs fail in this suit.

Assuming, however, that the lands belonged absolutely to the father, the plaintiffs will also fail unless they can establish that he died intestate as to these lots.

I am free to confess that upon the argument, and until I came to discuss the matter with my learned brothers, I was under the impression that all that the testator intended to devise under the 5th section of his will was such portions of the 80 acres as then—that is at the date of the will—he owned, and which he should continue to own at the time of his death.

I have since the argument, in consequence of the obscurity in which this case was left upon the evidence as to whether the lots in question were included in the 80 acres, obtained a sketch from the defendant's counsel shewing that they did in fact form part of that block of land.

I was at first inclined to think that the exception of "so much thereof as I may have sold and conveyed" was a clear indication on the part of the testator of his intention not to deal in his will with any portion of the 80 acres except that of which he was then seized; in other words, that he intended to devise that portion only in the same manner as if he had described it by metes and bounds as that portion of the 80 acres, part of lot 12, which I acquired from A. B., which may be described as follows: but upon an examination of the cases decided under the similar provision in the Wills Act in England, I think I should not be giving effect, as I am bound to do, to the intention of the Legislature, when they say that I am to read the will as if it had been made immediately before the death of the testator, if I did not read this as applying to the 80 acres as they stood at his death. Read thus is it possible to suppose that when he devised the 80 acres with the exceptions

mentioned, that he intended to except any portions which he had once sold or conveyed, but which had re-vested in him, or, applying the same rule as before, must the words not be intended to indicate the intention of the testator to devise the whole of the 80 acres of which he was then—that is at the time of his death—seized.

In the case I have supposed, if the testator had described by metes and bounds a particular portion of the 80 acres, and devised it, and afterwards had acquired these two lots which had at one time formed part of the 80 acres, I should think they would not pass, because a contrary intention was expressed. He specifically devised a particular thing, and the specific devise did not include these two lots; but when he devises all the 80 acres, except those portions sold and conveyed, all of the 80 acres which he owned at the time of his death would in my opinion pass, because the will speaks as if it were made immediately before his death, when he owned these two lots as part of the 80 acres.

Then it was said that a contrary intention was expressed here, because in the immediately preceding clause of the will the devise was of so much of lot No. 12 as I may die seized or possessed of, and the absence of similar words in the 5th clause was a reason for contending that the testator had a different intention as to the two pieces of property; but the case is not distinguishable from *Lord Lilford v. Keck*, 30 Beav. 300, where in disposing of the case the Master of the Rolls remarked, "If I were to hold otherwise it would come to this, that after acquired property never would pass unless expressly specified."

I am of opinion, therefore, that if the lands were vested in the testator for his own use, they passed under the devise, and this appeal ought to be allowed and the bill dismissed, with costs.

PATTERSON, J. A.—We have to decide whether the decree is correct or erroneous which declares that Benony Vansickle, in whom the legal estate in village lots 1

and 2 on the south side of Margaret Street, in the village of Lynden, was vested, died intestate as to those lots, and that the plaintiffs, who are some of the heirs-at-law are entitled to partition of those lots as against the defendant Nathan Vansickle, one of their co-heirs.

While, in common with the other members of the Court, I agree with the learned Judge who made the decree in most, if not in all, of his findings of fact, I also agree that the plaintiffs have not established, their right to maintain the decree; but as my opinion may not rest on precisely the same ground as that expressed by his Lordship the Chief Justice, I shall endeavour to give my own reasons in as few words as possible.

Nathan the defendant contends that Benony his father held the land merely as security for certain moneys which he advanced. He asserts that his brother George, who owned these lots, agreed to convey them to him in consideration of moneys to be paid by Nathan in discharge of liabilities of George; and, the father having given his note for \$375 of George's debts, on an occasion at Hamilton, when it was intended that George should have made a conveyance to Nathan, but when Nathan happened not to be present, the deed was made to the father for his security.

If there were a real contract between George and Nathan—a fact which was not found one way or other in the Court below, though the learned Judge was of opinion that if there were it must have been made with Nathan as agent for his father—the father may have been trustee of the land for Nathan, subject to the charge for his advances; and in that case it is immaterial, as far as the present decree is concerned, whether the lien was for the \$375 only, or for that sum plus the money expended by Nathan in building on the property. If the father were trustee there could be no question of partition.

But Nathan also contends that if the lots should be held to have belonged to the father unaffected by any trust, they passed to him under his father's will, and that upon that state of things the partition is equally out of the question.

This last contention is, I think, well founded.

There are two clauses of the will, the 4th and 5th, to be looked at.

It will be remembered that the two village lots are part of the township lot No. 12 in the first concession of Beverley; and that Benony Vansickle, who laid out part of lot 12 into village lots, sold and conveyed these two twenty years before the date of his will, and did not re-acquire them until George, to whom they had come after several mesne conveyances, made the deed to him after the will was made.

The clauses in question read thus:

"4th. I give and devise unto my son Nathan, his heirs and assigns forever * * as much of lot number twelve, in the first concession of the township of Beverley, in the said county of Wentworth, as I may die seized and possessed of (except therefrom the south eighty acres of said lot number twelve).

"5th. I further give and devise unto my said son Nathan, his heirs and assigns, the south eighty acres of said lot number twelve in the first concession of the said township of Beverley, excepting so much thereof as I may have sold and conveyed, subject, however, as follows, that is to say: that my said son Nathan should not have power to sell, lease, mortgage, or dispose of the same, or any part thereof, during the widowhood of my wife, and that in the event of his death during the widowhood of my wife, then I give and devise the said eighty acres to my wife for her sole use and benefit and subject to her control so long as she remains my widow, after which the said eighty acres of land, with all the appurtenances thereof, shall be apportioned in five equal shares, one share whereof shall go to the children of my said son Nathan, and the remaining shares equally between my sons, George, Henry, Benony, and Thomas, and to be held by the devisees as tenants in common."

The will has, of course, to be construed under the rule contained in section 26 of R. S. O. cap. 106, which follows the Imperial Act 1 Vict. c. 26 s. 24, and enacts that: "Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it

had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

It was not made clear whether the two village lots were or were not included in the south 80 acres of lot 12. Benony Vansickle, one of the plaintiffs, asserted, and adhered with a tenacity that was proof against cross-examination to the assertion, that while the lots are (as alleged in the bill) on the south half of the 200 acre lot, and are south of the railway which cuts the lot in two, they are not on the south 80 acres. It is noted by the reporter that Mr. Robertson, who was the leading counsel for the plaintiffs, admitted at the close of the evidence that the lots in dispute were part of the south 80 acres; but I do not find that a similar admission was made on the part of the defendant, and if the locality of the lots was so stated in any part of the evidence I must have overlooked the passage.

If the lots are not part of the south 80 acres, but are north of that tract, as the plaintiff Benony so strenuously asserts, then the fourth clause of the will is fatal to his action. It is only by discrediting his accuracy and assuming them to be comprised in the 80 acres that any room can be found for argument in his favour.

Even on that assumption I think the lots would pass by the will.

I merely allude to Mr. Robertson's suggestion that no part of the township lot which had been laid off into village lots would pass under the original description of lot 12, for the purpose of remarking that it is quite inadmissible, and that it derives no support from the case of *Lawrence v. Ketchum* 28 C. P. 406, 4 A. R. 92, to which he referred.

The question under the 5th clause is, whether the words, "excepting so much thereof as I may have sold and conveyed," prevent these lots passing with the rest of the 80 acres which the testator owned at the time of his death. I confess my inability to feel the force of the arguments urged against their passing. Had the will been written after the testator had re-acquired the lots, and while they

carried all the lands owned by the testator at the time of his death which came within the descriptive words. The question under the Act of 1834 would be, whether the will "contains a devise in any form of words of all such real estate as the testator shall die seized or possessed of, or of any part or proportion thereof;" and I think such a devise is found in the general term "the south eighty acres," which is wide enough to embrace any part of that tract which the testator might happen to acquire, coupled with the expression "excepting so much thereof *as I may have sold and conveyed*," which I take to indicate a contemplation of future dealings with the land, and therefore to intimate the testator's intention to devise it as it may be at the time of his death. Under this Act, the matter for decision would be, whether the words, "the south eighty acres excepting so much thereof as I may have sold and conveyed," were intended to describe the whole of the south eighty acres of which the testator was not, at the time of his death, divested by sale and conveyance, or were intended to exclude such portions of the tract as he might once have sold and conveyed, but which had become vested in him again, and that question is, as I apprehend it, the same which is presented under the Act of 1869.

I have already expressed my opinion that the correct understanding of the devise is that which includes in it the lots 1 and 2, which I therefore hold to pass under the will, if it were not already the property of Nathan subject to the state of the account between him and his father.

For the reasons I have thus attempted to explain I concur in allowing the appeal and in dismissing the bill.

MORRISON, J., concurred in dismissing the bill in the Court below on the grounds stated by Spragge, C. J. O.

RE MURRAY—PURDHAM V. MURRAY.

Gift inter vivos—Trustee.

The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not indorsed by him. The evidence, in the Master's office, on taking the accounts of the estate, shewed that the wife had taken possession of this and other notes belonging to her husband during his lifetime. The Master at London found that under the circumstances appearing in the report of the case, 29 Gr. 443, the testator had intended the note to belong to the widow, and that it did not form part of the assets of the estate, which finding was reversed by the Court, [BLAKE, V. C.]

Held, *Per* SPRAGGE, C. J. O., and MORRISON, J. A. [reversing the order then pronounced], that the evidence established a valid gift *inter vivos*.

Per BURTON and PATTERSON, JJ. A. That even if the facts shewn in the evidence failed to establish a good gift *inter vivos*, the testator under the circumstances had constituted himself a trustee for his wife of the note. *Per* BURTON, J. A. The mere delivery of such a note, not indorsed, could not take effect as a gift *inter vivos*.

Per SPRAGGE, C. J. O. There is no distinction in this respect between a gift *inter vivos* and a *donatis mortis causa*.

Tiffany v. Clarke, 6 Gr. 474, remarked upon by SPRAGGE, C. J. O., p. 380.

THIS was an appeal by Mrs. Ann Murray, widow of the testator, from the order of Blake, V. C., made on appeal from the finding of the Master at London as reported, 29 Gr. 443, where the facts of the case are fully set forth.

The appeal came on to be argued before this Court on the
of 1883.*

Moss, Q.C., for the appellant. The evidence of Mrs. Murray clearly establishes the gift of the note in question by the testator, and her evidence is fully corroborated by the testimony of Mr. Parke.

W. Cassels, for the respondents. In *Byles on Bills*, 11th ed., p. 147, it is laid down that the note here in question could not be validly assigned or transferred unless indorsed by the payee. The evidence here fails to establish a valid declaration of trust in respect of the Parke note.

The cases cited are mentioned in the report of the case in the Court below.

* *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

In *Barton v. Gainer*, 3 H. & N. 387, the gift of a testator, some eighteen months before his death, was of two railway mortgages, which were regularly transferable only by deed duly stamped. Upon action being brought by the executors of the donor, the action was held not sustainable. It was not necessary, in order to a judgment for the defendant, to decide anything further than that she was entitled to hold possession of the documents against the plaintiff, but some of the language of the learned Barons in the course of the argument indicate their opinion, that more than the mere writings passed by the gift. Watson, B., says: "Suppose a person grants to another a bond and the bond debt, the debt passes in equity. A debt may be granted by parol without deed." And Pollock, C. B.: "It does not follow that a stamped deed is necessary to transfer the document of title." The Court held the defendant entitled to retain the documents; and in doing so expressed the opinion that effect ought to be given to the act of the testator, so as to make the gift effectual as far as it could be made so.

In Mr. Justice Byles's book on Bills of Exchange, and Notes, 13th ed. p. 126, under the heading "*Gifts inter vivos of a bill or note*," *Barton v. Gainer* is referred to "as the effect of a gift of a specialty," and the learned writer expresses as his own opinion—certainly a sound one, as I think—"If the bill be not transferable, or be payable to order and not indorsed, it is conceived that the effect of a gift is, to vest the legal property in the paper and the beneficial interest in the money in the donee," adding, a point which does not arise here: "who, however, must recover from prior parties in the donor's name." It would appear therefore that as between the donor, or his representatives, and the donee, the gift of a bill or note, payable to order, not endorsed, may be a good gift *inter vivos*. This was questioned in earlier times, but I do not find the question mooted during the last twenty years. *Barton v. Gainer*, was decided in 1858, *Veal v. Veal*, in 1859, and is I believe the last case on the subject.

The next question is, whether there is sufficient evidence

to support the alleged gift of this note. Reading the evidence given in the Master's office, one would scarcely suppose that the gift of *this* note was questioned. The contest appears to have been almost entirely, if not altogether, in regard to the alleged gift of the other notes. The evidence certainly shews that the Parke note was not brought into the testator's room, when by the testator's desire the several smaller ones were brought in. I think it very evident that this is so; for the amount of the several notes brought in was summed up by William Oliver, together with the amount of a mortgage for \$300 held by the testator, and the aggregate amount was less than the amount of the Parke note by itself. Further it does not appear that the Parke note was at all referred to by the testator, or spoken of in his presence. I infer from the evidence that it was not. If it had been, we should find it in the evidence of the Olivers, or one of them.

A passage in the evidence of William Oliver makes all this quite clear. He says that he had a conversation with the testator on the Tuesday before his death, and says, "He told me on that day that he had \$2,000 in the Dominion Savings Bank, and between \$1000 and \$1200 of promissory notes, and a mortgage of \$300, and he requested her, his wife, to bring the notes until I would count them up, to see what there were. * * I counted them up, and the mortgage, and I think that including the mortgage there were between \$1000 and \$1300."

This fact is very significant. The testator was in perfect possession of his faculties, as appears by the evidence. He knew pretty nearly the amount of the small notes, and when speaking of the amount as between \$1000, and \$1200, it is impossible that he could have included in the notes to which he referred a note for \$1,437. This is only consistent with the hypothesis that he no longer considered the large note as his own to dispose of, and supports the contention of the wife, that he had made a gift of it to her.

The learned Judge whose order is appealed from, founds

his judgment in part upon a passage which he quotes from the evidence of the widow : "The notes were given to me on the day before Mr. Murray's death." But it is evident from the context that she was speaking only of the small notes which she also claimed ; for she goes on to say, "I had always had possession of these notes. It was in the fore part of the week that the notes were taken out for Mr. Oliver. * * I did not give Mr. Parke's note : it was not spoken of. I put the notes in the drawer where I always kept them. Mr. Parke's note was kept in the same drawer in an envelope, separate from all the others."

There are other passages in her evidence which I refer to for a two-fold purpose. One as evidence for establishing her claim, the other as negating any intention on her part to claim that note as a gift of the testator on the day before his death. Speaking of a gift of some notes or an acquiescence by him in her keeping some notes, this occurring as she says on the day before his death, she speaks of them as the notes that had been produced before in that week, when she gave them to William Oliver to add them up at Mr. Murray's request, and adds : "There was a mortgage for \$300 with the notes. * * There was *another note* of Mr. Parke's that my husband gave me three or four years before his death. That was my property, and had been for years." She was not, so far as appears by the evidence, cross-examined as to the time or under what circumstances the alleged gift of the Parke note was made.

Apart from the question of corroborative evidence, and a circumstance mentioned in the evidence of Mr. Parke himself, the evidence to which I have referred seems to me to be sufficient under the authorities to make out a case of a good gift *inter vivos*. The circumstance mentioned by Mr. Parke is, that he paid to Murray himself shortly before his death, in the year that he died, \$100 on account of the note, and, what is material, that he indorsed the payment on the note ; he says that he took no receipt, but has no doubt that he made the indorsement. Parke is probably correct in this, as if wrong the production of the note, which

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afford us no aid in the consideration of this case. They were unlike, among other things, in this, that they were not between husband and wife. Assuming for the present that there was in this case no delivery of the Parke note to Mrs. Murray, I will consider whether there was, or was not, an effectual gift in the other mode pointed out by Lord Justice Turner as equally effectual, which he says may be the case if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and he suggests what is unquestionably good law, that the trust may be declared either in writing or by parol.

In *Grant v. Grant* the alleged gift, and which was supported, was by husband to wife, and was of several different and distinct articles, and given at different times. They consisted of two statuettes and two pedestals, a piano, two dessert services, and some engravings, all of which were intended to remain and did remain in the house occupied by the husband and wife, and for that reason held by Lord Romilly to be incapable of delivery. Lord Romilly held that the case before him must come into that class of cases in which it has been held, that though there is not an absolute delivery, a declaration of trust is sufficient. There was in that case no formal declaration of trust. Lord Romilly stated the question to be whether the husband had, used words which were equivalent to a declaration of trust and after saying that they need not be in writing, he adds: "They must be clear, unequivocal, and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, 'I hold the property in trust for you, nor . . . I hold the same for your separate use.' Any words that shew that the donor means to divest himself of all beneficial interest in the property, are in my opinion sufficient for the purpose of creating the trust. I think it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created, the trust." And he proceeds to give instances of what he would conceive to be sufficient to create the donor a trustee

for the donee, and to make a gift complete. One instance is, "I hereby give you £1,000 consols;" as another instance if A. were asked by C., "Have you given the stock standing in your name to B.," and A. said in reply, "Yes, I have given it to B. and it is his property." Another instance, that if, without being asked, he had voluntarily said, "I have given the £1,000 standing in my name to B." He puts the case of a husband saying to his wife, "I give you this vase or this chandelier," and asks, does he mean to say that he keeps any property in it for himself? If so he means that which the words do not import when he says expressly, "I give it to you." I have given though in an abbreviated form, the instances put by Lord Romilly, because some of the language in which he puts them are a good deal like the language which Mr. Parke speaks of as used by Murray when speaking of the gift of the Parke note to his wife.

Mr. Parke in his evidence gives a history of his debt to Murray. There had been a previous note to the one in question, which became outlawed; and Murray had frequent conversations with Parke about it, expressing a hope that he would pay it to his wife, saying that he had given it to her. When Parke signed the new note, Murray said that it was his wife's, and once or twice afterwards asked Parke when he was going to pay her.

This evidence of Parke is corroborative of the evidence of the wife, that her husband had made a gift to her of the Parke note. By what words, formal or informal, he made the gift, we do not know. We might have known more, if those who now question the gift had questioned her about it in the Master's office. There may have been a formal delivery of the note to the wife, or there may not. The evidence is that he made the gift, that she received it, and kept it in an envelope, separately, in her own possession. The evidence of the wife, and of Parke, as the evidence stands, prove a gift. The *onus* must be upon those who question the validity to shew that it was an imperfect gift. The only piece of evidence in that direction is the statement of Parke as to the indorsement on his note of a

payment of \$100 on account, indicating that the note was then in the possession of the husband. Parke was examined after Mrs. Murray, so that the absence of explanation by her of this circumstance is of less weight than it would have been if her evidence had been given after his. It cannot be said that the circumstance is not susceptible of explanation. The note may have been in the possession of the husband only on this occasion, and it may have been only for this purpose, and may have been with her consent, or it may have been without her knowledge. All this is mere conjecture, it is true; and I hazard the conjecture only to shew that the circumstance is not necessarily inconsistent with the truthfulness of what is stated by the wife. It is only in that view that it is material; for her possession of the note was not necessary to the validity of the gift, and an interruption of her possession would not affect it. Its only value is as a piece of evidence. That the note was in her possession after that occasion is clear, and that it was restored to her possession by the act of her husband is to be inferred.

The corroborative evidence in *Grant v. Grant* was of the same character as the evidence of Mr. Parke—statements by the deceased husband, that he had given to his wife, as presents to her, the several articles (with a small exception or two) which were claimed by her as gifts. There was indeed nothing beyond that, coupled with the evidence of the wife herself, to establish these gifts; no visible difference in possession or use, from what would have been the case if there had been no gift.

To my mind, what took place when the notes were called for by Murray is the strongest corroborative evidence. The Parke note was not brought in by the wife, nor was its absence commented upon by the husband. This, in connection with the fact that Murray mentioned, as the amount of his notes, an amount about corresponding with the aggregate amount of the small notes; and so leaving the Parke note out of his calculations, is *conduct* in perfect consonance with the fact of a previous

gift of this note, and supports very strongly the evidence of the wife that it was hers by previous gift from her husband. What took place on that occasion greatly outweighs, as a piece of evidence, the circumstance of the indorsement made by Parke upon his note, and its being brought to him by Murray for that purpose.

Since writing the foregoing, my brother Burton has given me his own view of the law of the case in a judgment which he has prepared.

I have read it carefully, but remain of opinion that the law is as I have taken it to be. I find no authority for the proposition, that while a promissory note payable to order, and not indorsed, may be a good subject of a gift *mortis causa*, as has been determined in *Veal v. Veal*, 27 Beav. 303, the same thing cannot be the subject of a simple gift *inter vivos*; and I have as yet failed to see any reason for such a distinction. This promissory note is a chattel. At common law, putting out of the case statutory provisions restrictive of the transfer of certain chattels, or requiring certain formalities, a transfer of a chattel, in the way of gift or otherwise, may be by parol—"by word of mouth"—as it is put in *Williams on Personal Property*, p. 34, and it was so held by Mr. Justice Strong in *Long v. Long*, 17 Gr. 259, 260, following *Kekewich v. Manning*, 1 D. M. & G. 176. We have seen, from Mr. Sergeant *Manning's* notes to the case of *London and Brighton R. W. Co. v. Fairclough*, 2 M. & G. 691, and which is referred to at some length in *Watson v. Bradshaw*, 6 App. 666, how it came about, that something beyond what was necessary at common law had been held to be necessary, where the transfer of a chattel was by way of gift. It had been by overlooking the distinction between a simple gift, as it is styled by Chancellor Kent, and a gift *causa mortis*. It was in short a *mistake*, which was rectified in subsequent cases.

Of gifts *causa mortis* Chancellor Kent says, 2nd Comm. p. 599, 10th ed.: "The English law on the subject of this species of gift is derived wholly from the civil law. Jus-

gift, the executor is not to be considered a trustee for the donee."

And this appears to me to be the true distinction, and is not varied in any way by any more recent decision. A *donatio mortis causa*, it is said, resembles a legacy inasmuch as it is ambulatory and incomplete during the life of the donor and may be revoked by him at any time before death, and is liable to the payment of debts on a deficiency of assets; but upon death the gift is complete. In the case of a gift *inter vivos*, if anything remains to be done to complete the gift, it cannot be enforced against the donor during life, nor against his estate after his death.

I do not understand the case of *Barton v. Gainer*, 3 H. & N. 387 to decide anything more than that the papers on which the security was written—the chattel, so to speak—passed by the delivery; and if the donee could make any use of that possession the Court could not deprive her of it; but it is no authority for holding that she could in any way enforce the payment.

Mr. Byles does, it is true, make the statement attributed to him by the learned Chief Justice, but the authority on which he relies, *Barton v. Gainer*, does not support the position.

A much more recent case, to the same effect as *Barton v. Gainer*, was carried to the Court of Appeal in England *Rummens v. Hare*, 1 Ex. D. 169. Lord Cairns in delivering judgment said: "This is an action not involving any question with regard to the right to the money secured by the policy but for the detention of the paper writing only. I say this because very different considerations apply to proceedings for recovering the security itself, and to proceedings for the recovery of that which is the subject of the security. * * * This was a gift of the Policy, and although there was no consideration for it, yet it was a valid gift to the mother with whatever advantage she could obtain from it. * * * We have nothing to say as to the money which is secured by it. This is one of those cases in which the plaintiff may no

the other, and it is for these reasons, I apprehend, that Mr. Justice Byles conceived and expressed the opinion that I have quoted from his book. A writer so able and so conversant with his subject could scarcely have mistaken the application of the case he cites to the subject that he was discussing.

Tiffany v. Clarke, 6 Gr. 474, was carefully considered, and the report of the case contains an elaborate judgment by a very able and learned Judge, the late V. C. Esten. *Veal v. Veal* had not then been decided. *Barton v. Gainer* is not referred to in the case, and if heard at that date, the report of the case had not then probably reached Canada. The learned Vice Chancellor treated the case in judgment as a case of great difficulty and doubt. I do not say that it was wrongly decided, but it is necessary, at any rate, to read it in the light of the other cases to which I have referred. It is to be observed, too, that in that case, as in several others to which we have been referred, the question was raised by the donee upon a bill filed against the representatives of the estate. The prayer in that case was that it might be declared that the transfer made by the alleged donor was, under the circumstances, a valid gift or transfer, if not as a *donatio mortis causa*, yet, as a *donatio inter vivos*, and that the defendants, as trustees and executors, should be directed to assign and transfer the mortgage (the alleged subject of gift) by a formal instrument.

This case comes before us differently. We are not asked, nor was the Court below asked, by the widow to intervene actively in her behalf. The question arose in the Master's office upon parties beneficially interested in the estate seeking to surcharge the executors of the testator with a certain sum of money, being the amount of the note in question, as assets of the estate in the hands of the executors, the Master disallowing the surcharge, and "finding" (as he reports) "the said promissory note not to be an asset of the testator's estate in the hands of the said executors." The question, therefore, is presented in substantially the

same shape as the like question was presented in *Barton v. Gainer*. If that case be good law, the widow is entitled at the least to the piece of paper (I use the language of one of the Judges) upon which the note in question is written. And if so, that same note cannot be an asset in the hands of the executors, with the amount of which they can properly be surcharged.

That is, as it was in *Barton v. Gainer*, the only question that it is really necessary to decide. The Judges in that case intimated their opinion that the donee was entitled to more. In this case I am prepared to concur in the opinion expressed by Mr. Justice Byles in his book, that the effect of such a gift as this is to vest the legal property in the paper and the beneficial interest in the money, in the donee.

The proper conclusion, from the whole of the evidence, and upon the law, in my opinion is, that the claim of the wife to the Parke note is established as a gift *inter vivos* and, consequently, that the appeal should be allowed, with costs.

BURTON, J. A.—I agree in the view that this appeal should be allowed, but I desire to place my decision distinctly on the ground stated by my brother Patterson, that there is evidence from which the Master might properly have found that the deceased had constituted himself a trustee for his wife, and that he held the note in that character.

If the case turned upon the validity of the gift as a gift *intervivos*; and if Mr. Cassels conceded that such a gift of a note payable to order, and not indorsed, would be good as a gift *inter vivos*, as well as *mortis causa*, I am not at present prepared to accept that view of the law.

I have been unable to find any thing to support the proposition that the mere delivery of such a note, any more than the delivery of a bond, mortgage, or other chose in action, intended as a gift *inter vivos*, would be upheld, whereas a simple delivery of them *mortis causa* would pass the property secured by them to the donee.

that a complete gift had been made, told us taht he had found no case in which a note like this one, payable to order, had been held to be the subject of a complete gift without indorsement, and I cannot say that my researches have been more successful, except with regard to *donationes mortis causâ*, as in *Veal v. Veal*, 27 Beav. 303, and *Re Mead*, 15 Ch. D. 651.

We cannot complain of any scarcity of decisions on the general subjects of voluntary gifts. A very large number are collected in the notes to *Ellison v. Ellison*, in the first volume of *White and Tudor's Leading Cases in Equity*, and I have looked at some others in the English reports and in Irish reports, and in those of our own Courts. On some points one finds a variety of opinion which is apt to be perplexing, and almost to provoke the exclamation *Quot homines tot sententiæ*; but some principles have come to be definitely settled, and amongst them is the important rule stated by Lord Justice Turner, in *Milroy v. Lord*, 4 D. F. & J. 274, that if a settlement is intended to take effect by transfer, the Court will not hold an ineffectual attempt to transfer to operate as a declaration of trust, and, *apropos* of the questions which arise in cases like the present, we find a useful caution suggested by Sir George Jessel, in *Richards v. Delbridge*, L. R. 18 Eq. 15, against confounding cases of voluntary gifts with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the Court will enforce.

In this case I prefer to express no opinion of my own upon the question of fact, or mixed question of fact and law, whether a complete gift was or was not made of the note in discussion, by virtue of which Mrs. Murray could, without requiring more to be done by the donor, have enforced payment against the maker.

It is clear that the chose in action remained *at law* in the testator; and it is clear that he might have done an act, namely, the indorsing of the note, which would have transferred *at law* that chose in action. If the transfer of

the legal right to this thing, which was capable of being transferred at law, were essential to the completeness of the gift, then it is certain that the donor had not done all that he could do to complete it. And this test, which is one of those given in the cases, would tell against the claimant. How this ought to be held, if the establishment of a gift were essential to the claim, I do not assume to decide.

But while I give no opinion of my own on the point, I must not be understood to dissent from the opinion of his Lordship the Chief Justice that the right to the debt did pass as a gift, and that even if it did not, the paper on which the note was written at all events passed as a chattel, like the debentures in *Barton v. Gainer* 3 H. & N. 387. If the paper did so pass, the result would, no doubt, be fatal to the attempt to surcharge the executors with the amount of the debt which, for want of the voucher, they could not collect. But the fact is not found by the Master otherwise than as involved in the gift of the debt, which he does find; and the evidence as reported is so meagre, these questions apparently not having been anticipated when the witnesses were examined, that I prefer putting my judgment upon a ground in which I have more confidence. Treating the Master's finding as intending to affirm Mrs. Murray's claim to the note, without necessarily confining her title to a transfer by way of gift from her husband as against a declaration of trust, which would be fully as effectual, I find quite sufficient evidence to support the finding. This may be done without at all infringing the rule laid down in *Milroy v. Lord*. I find some remarks by Sir James Bacon, V. C., in *Heartley v. Nicholson*, L. R. 19 Eq., 241, in which that rule is stated with limitations which seem to me dictated by practical good sense. "It is established" the learned Vice Chancellor said, "as unquestionable law that this Court cannot by its authority render that gift perfect which the donor has left imperfect, and it will not and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection. In

Milroy v. Lord (as well as in many other cases) the error of dealing with the subject in any other manner, and the dangerous consequences which might thence ensue, are forcibly pointed out, and in that case the notion that the donor meant himself to become a trustee was effectually excluded by the fact of his having appointed another person to be trustee. But, without incurring the danger alluded to, it is not impossible that an intending donor may, by acts or words, in addition to and independent of the imperfect gift, have constituted himself a trustee."

Now, in this case, I repeat that I do not assume to find as a fact whether or not a gift was intended; if one was intended, I do not find as a fact that it failed by reason of the want of the indorsement of the note or by reason of any other imperfection; I do not treat the Master's judgment as necessarily implying that a gift, as distinguished from a trust, was either intended or attempted; and I do not find the contrary of any one of those propositions. But I do find that a trust is sufficiently proved by evidence to which the Master gave credit, and on which he based his opinion; and I find that upon evidence which, though not inconsistent with the theory of a gift, points more directly to the creation of a trust.

The facts thus proved are that while the first note given by Mr. Parke lay in the hands of the testator or of his wife—it does not appear and it does not matter which of them had the custody of it—and was barred by the Statute of Limitations, the testator told Mr. Parke that he had given the note to his wife, and that he hoped Mr. Parke would pay it to her when he was able. Then when Mr. Parke came to give the renewal note, the testator, while taking the note in his own name, told Mr. Parke that it was his wife's. This is a strong piece of evidence in the direction of proving the testator's declaration that he was to hold the note as trustee for his wife, as against the inference that he intended to divest himself of all interest, legal as well as equitable, in it, which would have been easily done by making the wife the payee, or by indorsing it to her.

The subsequent receipt by the testator of a payment on account of the note was not an act inconsistent with his trusteeship, although if a gift only was in issue it would have been, as it has with perfect propriety been urged as, a circumstance tending to negative the completeness of the gift.

On these grounds I am of opinion that the Master was substantially correct; that without violating any rule of law we can sustain his decision; and that therefore this appeal should be allowed, with costs.

MORRISON, J. A., concurred with the Chief Justice.

Appeal allowed, with costs.

VAN VELSOR ET AL. V. HUGHSON.

Evidence of title—Memorial executed by grantee—Judgment in partition—Vendors and Purchasers Act—Statute of Limitations—Costs of Appeal

A memorial registered over sixty years, but executed by the grantee only. *Held* not sufficient secondary evidence of the deed to which it purported to relate, notwithstanding that conveyances had been made at early dates by persons claiming under the registered title, but who had not had actual possession of the land.

The land in question was one out of several lots mentioned in the memorial, which had been patented by the Crown to the grantor named in the memorial, and two others, as tenants in common. The memorial set out a grant of an undivided moiety of each lot described in it. Proceedings in partition had been taken in 1834 by the grantee against another tenant in common, in which the lot in question had been assigned in severalty to the grantee :

Held, that these proceedings did not, even in connection with the conveyances above mentioned, avail to make the memorial admissible as evidence of the deed.

Held, also, that it would not be made admissible by the fact that possession of some of the lands had gone in accordance with it, so long as there had been no such possession of the lands now in question; and that it was not aided in this respect by the Vendors and Purchasers Act, R. S. O., ch. 109. But *Held* that the plaintiffs, who claimed only an undivided moiety of the lot under the grantee named in the memorial, while they could not recover in respect of the title of the grantor in that memorial, could nevertheless make title, by virtue of the judgment in partition, to the undivided interest of the patentee against whom the partition was had; that judgment being evidence as against the last-mentioned patentee of title to the whole lot.

One of the three patentees was not accounted for by the evidence, and it was not shewn that her title had devolved upon the others. The plaintiffs were therefore *held* entitled to recover only for one undivided third part of the land.

Upon the question of the Statute of Limitations it was *held* [affirming the judgment of the Court below, 45 U. C. R. 252] that forty years was the period of limitation, and that the defendants had not shewn possession for that length of time.

The plaintiffs had succeeded in respect of the title made under the judgment in partition, and not for the estate of the grantor in the memorial; and the effect of that judgment seemed not to have been pressed in the Court below, and was not urged before this Court until the second argument. Under the circumstances the appeal was dismissed without costs.

THIS was an appeal by the defendant from the judgment of the Queen's Bench (as reported 45 U. C. R. 252), and came on to be heard before this Court on the 19th of January, 1881.*

The facts appear in the report in the Court below and in the present judgment.

**Present* :—BURTON, PATTERSON, MORRISON, JJ. A., AND OSLER, J.

Robinson, Q. C., and Small, for the appellant.

Atkinson, for the respondents.

The following (amongst others) were the reasons assigned in support of the appeal.

(1). There was no sufficient proof of the deed from Margaret McGregor to James Woods, that deed not having been produced and no evidence having been given of possession thereunder or consistent therewith, or any other evidence such as to make the memorial thereof signed by the grantee sufficient or admissible evidence of such deed. (2). There was no proof of the death of James McGregor, husband of Margaret McGregor, before the execution of such deed. (3). There was no proof of any conveyance by Phillis Chabert, or of the right of Margaret McGregor to the share or any part of the share of the said Phillis Chabert; and under any circumstances the plaintiffs upon the evidence were not entitled to recover for more than one-third of the lot. The absence of such proof was objected to at the trial. (4). Joseph Woods had no power to convey to the plaintiffs more than his own beneficial interest in the land, as the release to him from those interested with him did not under the circumstances operate and was not intended to operate as a conveyance of the lot in question. (5). The defendant proved a title by possession. He shewed a possession of forty years of the whole or of some portion of the land in question. But the possession taken by a person claiming under one of the patentees excluded the plaintiffs, claiming under another patentee, from the benefit of the statutes in that behalf referred to in the judgment of the learned Chief Justice, and entitled the defendant to succeed on proof of 20 years' possession. (6). The title of A. J. Robertson by possession, under whom the defendant claims, was perfected while the 4 W. IV., c. 1, s. 17 remained in force, and the change in the law, if any, made by the Consolidated Statutes U. C., c. 88, s. 3, did not divest such title or revive the title of the other patentees, or pre

vent the operation of the statute against them or those claiming under them. (7.) The proceedings in partition were not legally proved and were invalid, or if valid they established that possession was taken by Joseph Woods, under whom the plaintiffs claim, and support the defendant's title by possession."

In support of the judgment of the Court below the plaintiffs stated the following, amongst other reasons:

"(1). Because the plaintiffs proved title to the lands in question (or at all events to an undivided moiety thereof) under the patent from the Crown and the conveyance from one of the patentees (Margaret McGregor) to the plaintiffs; and also under the judgment of the District Court of the Western District in a matter of partition whereby the lands in question (with others) were adjudged to and vested in one Joseph Woods through whom the plaintiffs prove title. (2). The deed from Margaret McGregor, though not produced, owing to its loss, was nevertheless sufficiently proved and its contents sufficiently shewn by the secondary evidence adduced, and particularly by the following documents and facts which are in evidence:—

(a). The certified copy of the memorial thereof. (b). The proof required and adduced upon the registration of such memorial, namely:—the oath of one of the subscribing witnesses to the said deed as to its due execution. (c). The mortgage of the lands in question by the said James Woods to the Bank of Upper Canada, and the discharge of part of the lands by said Bank, inclusive of the lands in question. (d). The fact that the said Arthur J. Robertson (through whom the defendant claims) took from the said Joseph Woods (who held such lands under the aforesaid deed from Margaret McGregor to James Woods) for the expressed consideration of two hundred pounds, a conveyance of the undivided halves of lots thirteen and fourteen in the second and lot fourteen in the third concessions west of the communication road, in the township of Harwich, being three of the lots embraced in said patent, and

executed and registered a memorial of such conveyance.
(e). The proceedings in partition, the judgment therein and record thereof, and the reference in such judgment and record to the conveyance of the lands lastly mentioned.
(f). The evidence, the assessment of the land in question.

These documents and facts taken together are sufficient secondary evidence to enable the Court, without a doubt and with certainty, to find that the deed made and delivered by Margaret McGregor was duly executed by her to said James Woods; and it is submitted that on these evidences there is neither a moral doubt that Margaret McGregor executed the said deed or that she had a right to do so, nor a legal objection to the conclusion arrived at by the majority of the Court below, that she did duly execute the same, and that there was sufficient conclusive secondary evidence of that fact. (2). The facts above set forth and particularly the statement in the registered Memorial of the deed from Margaret McGregor to the said James Woods, and the long period of time that has elapsed since the execution and registration of the said Memorial, sufficiently establish the widowhood of the said Margaret McGregor at the date she executed the said deed, (see R. S. O., c. 109, ss. 1 & 2) and in any event at this distance of time the Court would assume it as a fact. (4). The evidence shews that Margaret McGregor and Mary Ann Robertson, two of the patentees of the lands in question, each claimed and assumed to deal as owner with an undivided half of the lands in the said patent comprised, and that those claiming under them respectively have always asserted similar rights without dispute or hindrance. It will be presumed that Phillis Chabert (their co-patentee) died before the twelfth day of February, 1816, the date of the execution of the said deed from Margaret McGregor to James Woods, and it will be presumed she died without issue and intestate: *Doe Oldhams v. Warsley*, 8 B. & C. 22. *Doe Bunning v. Griffin*, 15 East 293. (5). The said Arthur J. Robertson, having taken the conveyance from the said Joseph Woods for the consideration therein ex-

pressed, must be presumed to have done so with full knowledge of the facts that the said Phillis Chabert had previous to the conveyance by Margaret McGregor died intestate and without issue, and that the said Margaret McGregor and Mary Ann Pattinson, afterwards Mary Ann Robertson, were her sole heirs, and that the said Margaret McGregor had duly conveyed the said lands with those now in question to the said James Woods; and therefore the said Arthur J. Robertson and those claiming through him, including the defendant, are estopped from disputing these facts after so great a lapse of time. (6). For like reason the said Arthur J. Robertson was, and the defendant is, estopped from disputing the plaintiff's title through Margaret McGregor by the proceedings, judgment, and record in partition. (7). The plaintiffs' title was not displaced by the evidence as to title adduced on behalf of the defendant, neither was there any sufficient evidence of title in the defendant by length of possession. On this point the Court below are unanimous."

June 30th, 1882. PATTERSON, J. A.—This is an action of ejectment to recover possession of lot ten in the second concession west of the Communication Road, in the Township of Harwich, in the County of Kent. The defence is limited to the north-east half of the lot. The plaintiffs claim by a paper title. The defendant gave notice that he claimed title under a conveyance from one John B. Sheldon, and also under the Statute of Limitations, but before us he confined himself to the latter, in addition to disputing the title of the plaintiffs. At the trial a verdict was entered for the defendant upon the ground of the statute, and leave reserved to the plaintiffs to move to enter a verdict for them. They moved accordingly, and after the case had been twice argued, judgment was given in favour of the plaintiffs by a majority of the Court of Queen's Bench, Mr. Justice Cameron dissenting.

The case has been presented to us as one in which each

party holds the other to strict legal proof of the title he sets up; and we are told that that was the attitude of the parties at the trial, nothing being admitted, and nothing taken for granted. Our attention was particularly called to this by Mr. Robinson because, as he understood, the judgment of the majority in the Court below proceeded partly upon facts which were, (erroneously as we are informed) understood to be admitted on the part of the defendant.

The plaintiffs undertake to prove a chain of title, beginning with the patent, which issued in 1812, granting the lot in question with other lands to Mary Ann Pattinson, Margaret Chabert wife of James McGregor, and Phillis Chabert; and ending with a conveyance dated 20th September, 1873, from one Joseph Woods to the plaintiffs, of an undivided one-half of lot ten in the second concession west of the Communication Road, with other lands.

The question, so far as the plaintiffs' paper title is concerned, is, whether they have succeeded in connecting these two extremes.

Joseph Woods was a son of James Woods, who died in 1828, leaving a will, by which he devised all his real estate to his sons James and Joseph in fee, upon trusts for various members of his family. James, the co-devisee of Joseph died within a few years after his father. In 1851 the beneficiaries under the will executed a general release to Joseph; and thus the land now in question, which seems to have been lost sight of in the distribution of the testator's property, became absolutely vested, for whatever estate passed by the will, in Joseph.

Proceedings were taken by Joseph in 1834, for a partition of a number of lots of land, comprised in the patent of 1812, and including lot ten in the second concession, of which he alleged he was tenant in common with one of the patentees, Mary Ann Pattinson, who had become the wife of Arthur J. Robertson. The proceedings were under the statute of Upper Canada which, in the Revised Statutes of Upper Canada, is called 2 Wm. IV., ch. 35, and in the statutes

as originally published, 3 Wm. IV., ch. 2. They were in the District Court of the Western District. The exemplification of judgment which is in evidence shews the petition of Joseph Woods, which is certified to have been presented in June term, 1834, and which states that Joseph Woods as surviving devisee in trust under the will of James Woods, and Mrs. Robertson were seized in fee simple and as tenants in common of certain real estate, including lot ten in the second concession, each for one undivided one half part: that notice in due form of law had been given to Mrs. Robertson and her husband, and all others whom it might concern, to shew sufficient reason (if any such there were), why partition should not be made according to the statute: and prayed that his part might be set off and assigned to him in severalty.

The judgment then sets out the notice addressed to Mr. and Mrs. Robertson, both of Scotland, and the president, directors, and company of the Bank of Upper Canada, and states that none of those parties appeared; and, after a continuance to the first day of the following September term, shews the award of judgment for the petitioner, the writ to the sheriff, and his return of an inquisition taken on the second day of January, 1834 (which is evidently a clerical error for 1835), in 5th Wm. IV.; and, amongst other things, the assignment of lot ten, in the second concession, in severalty to Joseph Woods.

I do not propose at present to discuss the effect of these proceedings.

The plaintiffs claim that James Woods, the testator, held by conveyance from Margaret McGregor, another of the patentees, her share of the lands, whether that which she derived directly under the patent or the interest, if any, which may have come to her by devolution from Phillis Chabert, the third patentee.

In support of this claim they produce a memorial of a deed purporting to be dated 12th February, 1816, from Margaret McGregor, widow of James McGregor, to James Woods, conveying Margaret McGregor's full undivided

one-half of 1800 acres of land, including all the lands contained in the patent of 1812, which were 1000 acres, and 800 acres of other lands the history of which is not before us. This memorial is executed by the grantee and not by the grantor. The deed to which it relates has not been produced. No dispute has been made before us as to the propriety of receiving secondary evidence of it; but the defendant contests the sufficiency of the secondary evidence offered. The effort on the part of the plaintiffs is to make the memorial secondary evidence of the deed. By itself it is clearly not sufficient. The law upon the subject is fully and ably discussed in the judgment of Hagarty, J., in *Gough v. McBride*, 10 C. P. 166, and I can say no more as to it than that I concur in all that is there said. In one aspect of this evidence the case exactly resembles *Gough v. McBride*. We have a memorial signed by the grantee only, and we have the fact that during the time, between sixty and seventy years, since its execution and registration, the possession of the land in question in this action has never been consistent with that registered title.

If this were all the evidence on the subject there need be no hesitation in holding the evidence insufficient, as it was held in *Gough v. McBride*.

But it is contended that the effect of dealings which are shewn to have taken place respecting this land, and other lands held or claimed to be held under the same title, is to make this memorial receivable as sufficient secondary evidence of the deed.

The first of these transactions was the making of a mortgage in 1827 by James Woods to the Bank of Upper Canada, upon nearly 6000 acres of land, in which quantity was included the undivided half of fourteen lots, containing together 2800 acres and including the 1800 acres mentioned in the memorial of 1816. The bank in 1829 released to the devisees of James Woods all the lands mentioned in the mortgage, and "yet remaining under and by virtue of the said indenture," except two lots in the fifth concession of Harwich.

Then a memorial is produced, registered in April, 1834, of a deed dated 30th October, 1833, from Joseph Woods, surviving devisee of James Woods the elder, to Arthur J. Robertson, conveying the undivided half of lots thirteen and fourteen in the second concession, and of lot fourteen in the third concession of Harwich. These lots are mentioned in the patent and in the memorial of 1816. They are stated in the memorial to have been conveyed in satisfaction of a debt which James Woods, the testator, owed Richard Pattinson, the father of Mrs. Robertson. This memorial is executed only by Robertson the grantee. It is open to the same objections as those which apply to the memorial of 1816, as secondary evidence of the deed to which it refers; but, as against Robertson, it evidences a recognition of the title of James Woods to the lots it mentions. The plaintiff VanVelsor would appear to have bought these lots from Robertson in 1873, though that is not proved otherwise than by a memorandum under his hand and seal, accepting the title of Robertson, and agreeing not to hold him or his trustees responsible in respect of a claim which it is stated is made by some one as assignee of one Woods.

The other transactions are the partition proceedings in 1834, and a conveyance made by Robertson and his trustees in 1872 to one Sheldon, of the land now in dispute, under which title Sheldon, also in 1872, conveyed to defendant Hughson.

There is also the fact, sworn to by Joseph Woods, that the estate of his father was distributed amongst those beneficially entitled to it, except the land now in question.

The acts done by James Woods, or Joseph as his devisee, so far as shewn by this evidence, were merely transactions upon paper. We do not know that possession of any part of the lands was taken. It may be surmised that in the distribution of the estate of James Woods, or under the titles derived through his representatives, the bulk of the lands have been long since occupied; but nothing of that kind is shewn. If such a fact were

important, it would be right, as suggested by the learned Chief Justice in the Court below, to give the plaintiffs an opportunity of proving it. We have first to decide whether it is of importance.

The only land, the possession of which is spoken of, is lot ten in the second concession, for which this action is brought. I may have to refer particularly to the evidence on this subject when I come to discuss the defence under the Statute of Limitations. At present it is sufficient to note that lot ten is shewn to have been occupied for many years by persons who appear to have entered as trespassers, but who attorned to Mr. Robertson, and held as his tenants. The connection of the defendant with these tenants is not shewn, nor does it appear how he got possession; but he seems to have been in possession before he got his deed from Sheldon.

I do not see that either principle or authority would justify us in holding that any dealings with the land, such as making mortgages or conveyances, or even taking proceedings in partition, would aid the effect of the memorial as secondary evidence. They are, at most, assertions of title of no greater weight or significance than the execution and registration of the memorial itself.

Will any greater effect attend the possession of lands, mentioned in the same memorial, but not being the lands in question in the action? At first sight there might seem reasons for answering this question in the affirmative. The point to be established being the existence of a deed containing what is recorded in the memorial, and not title to land apart from the proof of the deed, one is disposed to ask why is not the possession of any of the land, if of such a character as to lead to the inference that it was, in the language of Pigott, C. B., in *Scully v. Scully*, 10 Ir. Eq. R. 557, "influenced by a contract corresponding in import with that contained in the articles of which the document purports to be a memorial," sufficient to let in the memorial as secondary evidence of the deed, and then, as proving the whole con-

tents of the deed, so far as set out in it. But, on second thoughts, this argument, though plausible, seems fallacious. On what principle is it that long possession suggests the inference that it is under such a contract or title?

In answer to this I adopt the words of Hagarty, J., in *Gough v. McBride*, 10 C. P. p. 171, where he thus distinctly indicates the principle: "A long, undisturbed possession by the Goughs to the knowledge of the alleged grantors, who thus acquiesced in the long enjoyment of this estate by another, naturally suggests the presumption that such possession is of right. If we found the additional fact that the possessor affected to be the absolute owner, as by conveying to another in fee, &c., it would heighten the presumption. Our minds are first led to the belief that there was a right for all this, and then we are led on to infer, from all the circumstances, that the right was as is set forth in the memorial publicly placed on record with all statutable requirements, as a formal assertion of title by the grantee."

The inference to be drawn from a long unchallenged possession, that the possession is held under a title, would, in a case like the present be adverse to the registered title, and not confirmatory of it. The presumption of title is in favour of the man in possession; and as the man in possession of lot ten, presumably having title to it, and not pretending to have title to any of the other lots which happened to be included in the same registered document, would have no motive for challenging the right to the possession of those other lots, the fact of such possession, however long it may have existed without disturbance, cannot be evidence against him.

The statute respecting proof of titles between vendor and purchaser, R. S. O. ch. 109, does not aid the plaintiffs. When it enacts that in case of registered memorials twenty years old, of other instruments, if the memorials purport to have been executed by the grantor, or in other cases if possession has been consistent with the registered title, the memorials shall be sufficient evidence without

production of the instruments to which they relate, except so far as such memorials are proved to be inaccurate, it makes a memorial executed by the grantee primary evidence of the contents of a deed, whereas without the statute it would only be secondary evidence; but it requires that possession shall have been consistent with the registered title.

The primary object of the statute being to simplify the proof of titles between vendor and purchaser, it is obvious that the possession spoken of is possession of the very land to which title is being made; and the extension of the same rule to proof of title in an action gives it no larger effect, but leaves it to be read as applying to the possession of the very land the title to which has to be proved in the action.

I think, therefore, that the acts shewn to have been done upon paper, even if accompanied or followed by possession of some of the other lands, cannot be treated as sufficient to justify the admission of the memorial as evidence of the deed as against this defendant, if we regard him as a stranger to the title under which the plaintiffs claim.

In this opinion I do not think I differ from any of the Judges in the Court below. The judgment of the Chief Justice, in which Mr. Justice Armour concurred, in favour of the sufficiency of the evidence, I understand to have been influenced by the consideration that the defendant was not a stranger to the chain of title, as he had taken the deed from Sheldon, the vendee of Robertson. The Chief Justice says (45 U. C. R. 264): "I have come to the conclusion that as between Woods and Robertson, and those in privity with them, there is sufficient proof of the lost deed from Mrs. McGregor the patentee," and again (p. 267): "I have treated the defendant as in privity with Robertson, and the main question, as to the secondary evidence, I decide as if the contest were directly between Woods and Robertson."

If the contest were between Woods and Robertson I am inclined to think the evidence would be sufficient, princi-

pally because we find Robertson taking a conveyance from Woods of some lots, the only registered title to which was under the memorial of 1816, and partly also by reason of the partition proceedings to which Robertson and his wife were parties, or by which I assume for the present they were bound.

I cannot however see my way to find, under the evidence before us, that kind of privity between Robertson and the defendant which in this matter would affect him with Robertson's knowledge or bind him by Robertson's admission of title.

It is true that he purchased the land in question from Robertson in 1872; but we have to see what was the title he is shewn to have taken. By the recitals in the deed to Sheldon it appears that in 1840, after the death of his first wife, who was the grantee, Robertson, being about to contract a second marriage, conveyed to trustees the lot ten with many other lots. But so far as we can perceive he had no title to the lot at that time. We do not even know that he had an estate by the curtesy. The further recitals in the deed of 1872 certainly do not import that there had been issue of the first marriage.

Then there had been the judgment in partition in 1834. I do not at present inquire into its validity, but if valid it must have extinguished the title of both Mrs. Robertson and her husband. At a later date than 1834 Robertson, by attornment of the persons who were trespassers on the land, obtained possession of it, or of some part of it. This possessory right, whatever it amounted to, doubtless passed, in 1840, to the trustees of the marriage settlement, and in 1872 to Sheldon, by the deed in which Robertson joined; but that was not a title held in privity with Woods.

Therefore, although Robertson personally may, by reason of other transactions, and from his connection with the title to other parcels of land, have been liable to be treated as acknowledging the existence of the lost deed, I have not been able to satisfy myself that the defendant is to be

treated as occupying his position, or that we could properly say that Robertson while in possession of lot ten had admitted that Woods was owner of any interest in it.

My conclusion, therefore, is, that the memorial was not receivable as secondary evidence of the missing deed.

It thus becomes unnecessary to consider two other objections taken to the sufficiency of the evidence which the deed would have furnished, as a connecting link between Margaret McGregor the patentee and James Woods. These objections were to the absence of proof of the identity of Margaret McGregor who conveyed as a widow in 1816, with Margaret who was the wife of James McGregor in 1812; and to the absence of evidence of the death of James McGregor, and therefore of the power of Margaret to make a conveyance. The first of these objections was not much pressed. My impression is, that if the difficulty about the secondary evidence were got over, neither of the other objections would be insuperable.

If a conveyance from Margaret McGregor had been established, it could not be held, upon the evidence before us, to have passed more than her original undivided third part of the lot. We have not a word about Phillis Chabert. She is not in any way accounted for; and if we should presume that she died long ago, unmarried and intestate, we could not carry the presumption so far as to suppose that her estate devolved upon the other ladies who were tenants in common with her, for they are not shewn to have been related to each other.

But while Margaret McGregor's title is not proved to have passed to Woods, it seems open to argument whether Mrs. Robertson's title did not vest in him, by virtue of the proceedings in partition. And whether, therefore, the plaintiffs may not, after all, have made title to an undivided third part of the land in question.

This question was certainly not debated before us, even if it was touched upon at all in the argument. It is not alluded to in the judgments delivered in the Court below and as no note of the arguments there has been given in

the report, except by reference to the judgments, we cannot say whether it was raised before that Court. It would seem from the shorthand writer's note to have been made at the trial by Mr. Atkinson, and his first reason against the appeal may be widely enough worded to cover it, but it is not pointedly presented. Under these circumstances, and having regard also to the plaintiffs' notice of title, we do not feel disposed to consider the question without hearing counsel if they desire to discuss it before us.

The plaintiffs may, if it is intended to rely upon this Pattinson or Robertson title, give notice to that effect to the defendant and to the registrar within two weeks from this date, or say before the 15th July, and the defendant may, before the 1st of August, intimate to the plaintiffs and to the registrar whether or not he intends to contest that title. If it is to be argued, the case may then be put on the list for hearing. In the meantime it will be proper, for the information and guidance of the litigants, that we should express our opinion respecting the defence, under the Statute of Limitations.

The learned Judge, before whom the case was tried without a jury, was of opinion that the defence of the Statute of Limitations had been established, and therefore entered a verdict for the defendant. He noted that he was by no means positive, but unfortunately we have no note from him of the particulars on which he considered there was room for doubt. From the nature of the note made by the learned Judge of his finding for the defendant, and from his expressly reserving leave to the plaintiffs to move, I assume that he believed all the witnesses to be worthy of credit; and the evidence seems to put it beyond controversy that there had been more than twenty years possession against the Woods' title before 30th June, 1876, when the action was commenced. It seems however also to be proved that when possession was taken the land was in a state of nature. It would have been of advantage to have had a finding as to how that was, and also as

to the existence of the other facts necessary to make forty years the period of limitation, and some intimation of the opinion formed at the trial of the length of possession actually held, whether forty years or under. It may perhaps be fair to assume that the opinion of the learned Judge was that forty years possession had been established, because the effect of the evidence shews that the period of forty years is the limitation which applies.

The evidence establishes certain dates and occurrences very distinctly.

In the autumn of 1836, or a short time, probably two months, within the period of forty years before suit, Donald Cameron moved with his family on to lot ten, settling on the south-west portion of the lot. He was not the first settler upon it, because three other persons named Small, Thornton, and DeClute, had been there before him. Small built a small house, and lived in it only a few months. Thornton occupied the same house after Small left, remaining only a short time, when he was succeeded by DeClute, who lived in the same house and cleared two or three acres. After he had been there "maybe a year, maybe less," as a witness puts it, Donald Cameron bought out his interest in the lot, giving him a cow in part payment for it, and went into possession. A Mr. Grant was acting at that time as agent for Mr. Robertson. He found Cameron on the lot when he visited it in 1836 or 1837, and in September, 1837 Cameron took from Mr. Grant a lease for eleven years of the whole lot, for which, as rent, he was to pay £1 5s. a year, and taxes, and to clear and fence each year three acres of land. The lease was in the name of Mr. Grant, but he acted in giving it on behalf of Mr. Robertson.

Donald Cameron died in 1842. His widow and sons continued upon the place. Their dwelling house was on the south-west part, and all the clearing and fencing that was done upon the lot was done on that portion of it, until about the year 1851, when John Cameron, one of Donald's sons, chopped six or eight acres on the north-east half.

Soon after that Mrs. Cameron, Donald's widow, who had continued to claim the whole lot, sold the north-east part to one Smiley, who built a house upon it and lived there, and made improvements. He died about 1869 upon the place, and was succeeded in the occupation of it by one Sole his son-in-law, who left it after three or four years, there being then forty or fifty acres cleared, and Sole was succeeded by the defendant, who built himself another house. Mrs. Cameron bought the south west part. Portions of the north-east half seem to have been occupied, in privity with Smiley, by his son and by one Hunter. The Smileys and Camerons all acknowledged that they held under Robertson, signing written attornments.

Upon this evidence we have the separation of the holding of the two halves of the lot, that is, the south-west half and the north-east half, explained. The whole lot was held under lease from Robertson until something over twenty years before suit, when Smiley took the one-half, and Mrs. Cameron retained the other.

Was the evidence sufficient to justify the finding that the possession of DeClute, who lived on the south-west part of the lot when the forty years began to run, was possession of the whole lot?

With the best possible disposition to find for the defendant, I am compelled to answer in the negative.

The first occupation of any part of the north-east half of the lot was, as I have shewn, in 1851. At the beginning of the period of forty years the only portion of the whole lot occupied was a small tract of some three or four acres, and that was on the other half of the lot. I have looked in vain for anything in the evidence that could be laid hold of to extend this occupation by relation or construction.

When Donald Cameron took the first lease from Mr. Grant, he became, as against Mr. Grant and as against Mr. Robertson whom Grant represented, constructively in possession of the whole lot. But that was within the forty years. If the fact of Mr. Grant's insisting upon Cameron's

taking a lease of the whole could be taken as evidence against him or against Robertson of the recognition of Cameron's previous possession, as having been in possession of the whole lot, no such effect could be ascribed to it as against Woods.

I do not say that a title under the statute may not be acquired, under certain circumstances, to wild lands, and even unenclosed wild lands. But before this can be done, the terms of the statute must be satisfied. Take the ordinary case, the most common of those to which the Real Property Limitations Act applies, where the person claiming the land or rent has been in possession or in receipt of the profits of the land or in receipt of the rents. The possession of the land may be either actual or constructive. The possession of wild lands will ordinarily be constructive only, following the legal title. The statute runs from the time such person has been dispossessed, or has discontinued such possession or receipt. Dispossession, *ex vi termini* implies the actual entry of some one. It is the act of another. Discontinuance is one's own act. It does not signify merely ceasing to occupy, for the constructive possession will in such a case continue: *Smith v. Lloyd*, 9 Ex. 562. But I can easily understand that there may be a discontinuance of one's constructive possession, and some act or admission, short of the creation of a legal title, which may transfer the constructive possession to another who does not enter into actual occupation. What conduct would suffice to produce this effect must in every case be decided upon the facts presented. For examples I may refer to *Pringle v. Allan*, 18 U. C. R. 575, where the subject is discussed by Burns, J., and to the judgment of the present Chief Justice of this Court in *Moffitt v. Walke*, 15 Gr. 155.

It is impossible to say upon the evidence before us that Woods, if we assume that he had title as against the Robertsons to the whole lot, and with his title constructive possession, ever discontinued that possession. Such discontinuance could scarcely be found upon evidence which

would not at the same time prove knowledge of the adverse possession, and so reduce the period of limitation to twenty years. Neither is there any evidence whatever on which the dispossession can be held to have extended beyond the bounds of the tract actually occupied. The decisions on this subject in our own Courts are too well known to need to be cited. I may, in addition to them refer to a decision of the Supreme Court of New Brunswick, *Doe DeBarres v. White*, 1 Kerr 595.

The case again came on in pursuance of the foregoing judgment on the 12th of March, 1883.*

Robinson, Q.C., for the appellants.

Atkinson, for the respondent.

The authorities cited appear in the former reports and in the present judgment.

December 11, 1883. PATTERSON, J. A.—When the opinion was intimated by the Court, on the 30th June, 1882, that the defendant had not succeeded in establishing his defence under the Statute of Limitations, and that on the other hand the plaintiffs had failed to prove a conveyance from Mrs. McGregor to Joseph Woods of her undivided interest in the property, as one of the three patentees, which was one of the links in the chain of title which the plaintiffs had, rather unnecessarily, set out in their notice of title, we called attention to the evidence which went in the direction of supplying the place of the missing link by another which had not been specified in the notice. I shall read what we said on the subject :—His Lordship here read the passage commencing with "Proceedings, &c.," ante p. 395, and ending with "district," p. 396. Also from "But while," to "discuss it before us," at p. 403.

The matter has since been argued before us, and we have to say what we take to be the effect of the judgment in the partition proceedings, as evidence of title to the Patinson or Robertson undivided share of the lot.

* *Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

The judgment appears to me to be perfectly regular. The notice calls on the parties to shew cause at the term, "commencing on the twenty-third day of June, now next," which was the term at which the petition was presented under section two of the statute. The due service of the notice must have been made to appear to the Court: therefore the Court did not require, under the proviso to that section, to direct any further notice to be given. Judgment might have been given during that term, or (by sec. 3) a continuance granted to the succeeding term; and we find a regular entry of continuance by *dies datus*.

I think the judgment is sufficient evidence (*prima facie* at all events), as against Mrs. Robertson and her husband, of the acquisition by Joseph Woods of whatever interest they had in lot ten, which as far as the evidence before us shews was one undivided third part, as granted by the patent to Mrs. Robertson, because it is not proved that any part of the interest of Phillis Chabert had devolved upon her co-patentees.

If Joseph Woods had had occasion to bring ejectment against Mr. or Mrs. Robertson, I do not understand on what principle this record would not have been good evidence of his right as against them. A recovery in a former action of ejectment would have been admissible evidence: *Doe Strode v. Seaton*, 2 C. M. & R. 728. This judgment I think stands in the same position as to its admissibility, but its effect is greater, because it affirms his title, and not merely his right to possession.

The omission to include this link in the notice of title cannot stand in the way of our giving effect to the title as proved. What the statute requires is notice of the nature, not of the details of the plaintiffs' title.

The enactment in C. S. U. C. ch. 27, sec. 4, which is now found in R. S. O. ch. 51, sec. 5, was that: "To the writ, and every copy thereof served on any party, shall be attached a notice of the nature of the title intended to be set up by the plaintiff, as, for example:

- (1) By grant from the Crown;

(2) Or by deed, lease, or other conveyance derived from or under the grantee of the Crown ;

(3) Or by marriage, descent or devise, stating to or from whom ;

(4) Or by length of possession ;

(5) Or otherwise, according to the nature of the plaintiff's title, stating it with reasonable certainty. * * And at the trial the plaintiff shall be confined to proof of the title set up in the notice:" 36 Vict. ch. 8, sec. 62 R. S. O. ch. 51, sec. 6.

In *Coltman v. Brown*, 16 U. C. R. 133, it was decided that it was only necessary to state how the plaintiff claimed, as by conveyance, descent, &c., and from whom ; in the words of the statute, to shew the *nature* of the title, without exhibiting the chain of title.

An instance of the nature of the title being "otherwise" than in the four specific examples will be found in *Pettigrew v. Doyle*, 17 C. P. 459, where a majority of the Court of Error and Appeal held that a right to enter for forfeiture by breach of a condition in a lease could not be proved under a notice which set up a paper title.

The plaintiffs here correctly stated the *nature* of the title they claimed, namely, "as tenants in common under the patent by and under a deed of bargain and sale made by Joseph Woods to them." If they had stopped here the statute would have been satisfied. They, however, proceed to state how Joseph Woods acquired title, and, as I have mentioned, they relied upon a link which failed them, and omitted to state another which was sounder, or at least was more easily proved to be sound.

We have of course to be satisfied that the defendant has not been misled to his prejudice by this notice, and with this in view we called attention to the notice of title when we decided to hear a fresh argument on the question of this judgment.

There is no reason to suppose that any further facts could be brought before the Court, and therefore there is nothing to prevent our disposing of the question on the merits.

The notice may be amended if desired.

The result is, that the appeal should be dismissed, but, under the circumstances, without costs; and that the rule in the Court below should be varied so as to enter a verdict for the plaintiff for one undivided third part of the land mentioned in the defendant's notice limiting his defence.

SPRAGGE, C. J. O., BURTON, and MORRISON, JJ. A., concurred.

WRIGHT V. HURON.

Member of Synod—Vested Rights—Commutation Fund.

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society, upon trust to pay to the commuting Clergy their stipend for life and when such payment should cease then "for the support and maintenance of the Clergy in such manner as should from time to time be declared by any by-law or by-laws of the said Church Society, to be from time to time passed for that purpose." In 1869 a by-law was passed providing that out of the surplus of the Commutation Fund, clergymen of eight years and upwards active service should receive each \$200 a year, with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the Church Society) repealed all previous by-laws respecting the fund and made a different appropriation of it.

Held, reversing the judgment of *PROUDFOOT*, J. 29 Gr. 348, that they had power to do so under the terms of the trust, and that the plaintiff had no contract or vested right which could entitle him to object.

Seemle, that the proceedings of the Synod when the by-law was passed in 1876, as set out in the case, were regular.

THIS was an appeal by the defendants from the judgment of *PROUDFOOT*, J., reported 29 Gr. 348, and came on to be heard before the Court on the 9th of March, 1883.*

The facts giving rise to the action appear in the report in the Court below.

Robinson, Q. C., and *S. H. Blake*, Q. C., for the appellants. The plaintiff has not and had not at the time of the institution of these proceedings such an interest in the fund in question, neither does he occupy such a position in the

**Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

Diocese itself, as would entitle him to maintain this action or sustain the decree which has been pronounced. In fact he is a mere volunteer in the matter, as are also those on behalf of whom he professes to sue; being such, neither the plaintiff nor the other claimants have such a *locus standi* as will entitle him to claim and enforce the relief sought in this action.

The plaintiff seeks in fact to control the management of the funds of this Diocese, but this being merely a matter of internal arrangement of the Synod, this Court will not at the instance of volunteers interfere therewith.

The by-law, or canon, which purported to deal with the funds in the manner objected to by this bill, was unanimously and in due form passed at a meeting of the Synod which was attended by the plaintiff himself, and he cannot now be heard to object thereto.

The plaintiff never acquired any vested interest in the fund or any part of it by the canon referred to in the plaintiff's bill, [see p. 353 of 29 Gr.] neither did any of the other clergymen on behalf of whom he professes to sue. On the contrary, that canon as well as all others were of validity only while allowed to remain unrevoked and unaltered by the defendants, who have always assumed to vary the application of the fund and its income ever since such commutation fund was created.

The learned Judge in the Court below in his judgment does not appear to have given sufficient, if any, weight to the words "as should from time to time be declared" and "to be from time to time passed" used in the creation of the trust fund.

Idington, Q. C., and *Harding* for the respondent. The defendants cannot be heard to question the right of the plaintiff to sue, as such right has been recognized by the Bishop of the Diocese and by the defendants in the fullest manner possible, and was never made a point of in the pleadings or evidence in this action until the institution of this appeal.

Here the Church Society of the Diocese became trustees

of the fund with power from time to time and at all times to declare in what manner the surplus income thereof should be appropriated: and in pursuance of such powers the society as such trustees appropriated certain portions of the income of such fund to the payment to the plaintiff and certain named clergymen within the Diocese of certain annual allowances, whilst and so long as they respectively continued to fill and come within the conditions declared by such canon. And the plaintiff and such other clergymen thereby became possessed of vested rights therein of which they could not be deprived during such time as the parties retained their positions within the terms of the conditions and stipulations set forth in the canon; and the plaintiff, as one of the clergy of such Diocese, is entitled to a *pro rata* share of the surplus income of the fund for his maintenance and support, without power either on the part of the Church Society or the defendants to deprive him thereof.

In addition to the cases mentioned in the judgment: *Marchant v. Lee Conservancy Board*, L. R. 8 Ex. 290, and L. R. 9 Ex. 60; *Gibson v. East India Co.*, 5 Bing. N. C. 262; *Innes v. East India Co.*, 17 C. B. 351; *Regina v. Governors of Darlington School*, 6 Q. B. 682, were referred to.

March 27th, 1884. SPRAGGE, C. J. O.—The plaintiff is a clergyman in priest's orders in the Diocese of Huron, having been ordained to the priesthood in October, 1862.

In 1873, he was placed upon the Commutation List, and under a by-law of what was then the Church Society of the Diocese he became entitled to certain annual payments.

Under an Act of the Province of Ontario, 38 Vict., c. 74, the property vested in the Church Society was vested in the Incorporated Synod of the Diocese of Huron, subject to all the liabilities of the Church Society; and to hold all the property vested in trust, upon the same trusts as such property was theretofore held by the Church Society.

Under the Clergy Reserve Secularization Act, 18 Vict.

c. 2, under the order of the Governor in Council authorized by the Act, and under the commutation which was the subject of arrangement between the commuting clergy and the then Church Society, the sums received for commutation were paid to the Church Society upon certain trusts: First, to pay the commuting clergy their stipend or allowance during life; and secondly, as stated in the plaintiff's bill: "After the death of each of the clergy so commuting, that the said sum for which he had commuted should become the property of the said Church Society for the support and maintenance of the clergy of the said Church within the Diocese, or such other Dioceses as the said Diocese should thereafter be divided into; and in such manner as should from time to time be declared by any by-law or by-laws of the said Church Society to be from time to time passed for that purpose."

The Indenture entered into between the then Church Society of the Diocese of Toronto, and the commuting clergy, to be found at p. 64 of the Appeal Book, is in accordance with the last cited Act.

It appears from these Acts that the commutation moneys passed into the hands, first, of the Church Society of the Diocese of Toronto, upon a very general trust, after providing for the original commuting clergy, viz., for the support and maintenance of the clergy of the Church; and it was to be in such manner as should from time to time be declared by by-laws of the Church. And upon the new Diocese of Huron being constituted, the share of that Diocese in the fund passed into the hands of the Incorporated Synod of that Diocese, upon the same trusts and with the same power of declaring from time to time by by-law in what manner the trust fund should be dealt with.

The plaintiff was not one of the original commuting clergy; and so when placed upon the Commutation List he came under the second article of the trust. It was his right that the trust fund should not be diverted to any purpose outside of the support and maintenance of the clergy of his Diocese. But within that trust the "manner" of the appli-

cation of the fund was in the hands of the Synod of the Diocese. His case shortly upon that point is, that upon his being placed upon the Commutation List a right became vested in him; that, as he puts it, he had a vested right, that no change should be made in the by-laws which then existed for the management of the fund which should affect him.

I confess I cannot see how he can maintain that position in the face of the very explicit language which declares the trust. His position ignores the twice repeated words "from time to time." He took a benefit under the trust, but took it at the same time subject to all the conditions of the trust; and, *inter alia*, the power of the Synod to declare from time to time in what manner the trust fund should be administered; with the one limitation that it was to be for the support and maintenance of the Clergy of the Diocese. In my opinion his contention upon this point is wholly untenable.

There appears to have been at one time some irregularities in the application of the trust fund, in the payment of Catechists, Indian Missionaries, Interpreters, and for some other purposes not strictly within the terms, "support and maintenance of the clergy." But even at that date it was rather an improper admixture of funds than a withdrawal from the Commutation Fund, and a lessening of that fund by its application to other purposes, inasmuch as what was applied to other purposes was made good from another fund, which was at the disposition of the Synod, viz., the General Purpose Fund. But before the filing of the plaintiff's bill this was set right, and at that date there was no diversion of that fund from its legitimate purposes, and the plaintiff was at no time a sufferer by those irregularities. They were in truth rather errors in book-keeping than breaches of trust. All this is explained in the evidence of the Secretary-Treasurer of the Synod, Mr. Reed.

It was by a by-law of the Synod, passed on the 2nd of June, 1876, that what the plaintiff had theretofore received out of the Surplus Commutation Fund under a previous

by-law was affected; and his contention is that that by-law is invalid.

The plaintiff had before that date received an allowance from the Commutation Fund under a by-law passed on the 25th June, 1875, which by-law was in amendment of previous by-laws, under which also the plaintiff had received an allowance from the Commutation Fund. The plaintiff being dissatisfied with the by-law or Canon of June, 1875, gave notice that he would, at the next meeting of Synod, move to amend it in several particulars specified in his notice.

At the meeting of Synod on the above date the plaintiff moved his resolution or proposed by-law. The Reverend Mr. Logan moved an amendment, which was seconded by a Mr. Grey, and, after discussion, the amendment was put to the vote and was carried by a large majority. It was thought by several of those present that it was carried unanimously. There may be some doubt upon the evidence whether the nays were called for. The weight of evidence is that they were. Whether they were or not, it is certain that a vote was taken, and that it was largely in favour of the amendment.

No objection was made by the plaintiff, or by any one, to the regularity of the proceeding. I do not see what objection could have been made, unless possibly this, that notice not having been given of the proposed amendment, the only vote that could be given was one in favour of or to negative the resolution or by-law of which the plaintiff had given notice. It appears, however, to have been the practice of the Synod to receive and discuss amendments to propositions of which notice had been given, and to vote upon them, as was done in this case.

Further, it appears that minutes of the proceedings when the vote in question was taken were read in Synod on the following day. There is some conflict of evidence as to whether they were objected to or not. If they were, the objection was not that it was not in order to take a vote on the amendment, but only whether the minutes were accurate in stat-

ing the voting in favour of the amendment to have been unanimous, an objection that would assume the regularity of a vote taken upon the amendment. The plaintiff's evidence is, that he was not present at the reading of the minutes, that he came too late. The objection, if any, was made by Archdeacon Marsh, who had seconded the plaintiff's resolution.

The plaintiff says that he was present at Synod in the five succeeding years and made no objection, except that he did, as he believes, in 1880, say in Synod that he believed that the proceedings were illegal.

Further, it appears in evidence that in the three years succeeding the passing of the by-law passed by the Synod upon Mr. Logan's motion in June, 1876, the plaintiff received payments under and in pursuance of that by-law. Those payments were indeed less in amount than he would have been entitled to receive under the by-law which was in force when he was placed upon the Commutation List, or under the by-law of June, 1875; but these payments were made to him under the by-law of June, 1876, and it does not appear that he received them under protest. On the contrary, being asked if he took any steps to set himself right after the meeting of the Synod, in 1876, it being put to him interrogatively: "You thought you were wrong?" his answer is, "Yes, but I entered no protest."

It seems to me to be unnecessary to determine whether the proceedings in June, 1876, were strictly regular or not. I am far from saying that they were not. I am inclined to think that they were; but whether they were or not, it is not, in my judgment, now open to the plaintiff, after what passed at that meeting, and what has passed since, to object to them.

In my opinion, the appeal should be allowed, and the plaintiff's bill dismissed, with costs.

PATTERSON, J. A.—The fund in question is composed of the commutation money of those clergymen who agreed to pay their money into a common fund.

The Church Society, whose rights and obligations have devolved upon the Synod, held the fund under the terms of deeds executed in 1855 between the Society and each contributing clergyman, whereby the Society, in consideration of the payment by the clergyman of his commutation money, covenanted to pay him every year while he should continue to do duty in the Diocese, or be disabled by sickness from doing duty, a sum equal to that which he was in receipt of from the Clergy Reserve Fund, and for which he commuted; and as soon as that annual payment should cease, then to hold the principal sum and all interest and proceeds thereof upon such trusts for the support and maintenance of the clergy of the church within the Diocese, and in such manner, as should from time to time be declared by any by-law or by-laws of the said Church Society to be from time to time passed for that purpose.

I quote the deed as if it had been originally made with the Church Society of the Diocese of Huron, that being the effect of the Statute on the subject.

The plaintiff is a clergyman of the Church of England, within the Diocese of Huron. He was ordained in 1861, several years after the secularization of the Clergy Reserves, and consequently was not a contributor to the Commutation Fund. Some objections to his status as a clergyman of the diocese were urged before us, as they had been in the court below. I do not think anything need be said concerning them further than that, for the reasons given by Mr. Justice Proudfoot, they are untenable.

Thus the plaintiff's interest in the fund is that of one of the clergymen for whose support and maintenance the surplus income, after paying the stipends of the contributing clergymen, was to be applied "upon such trusts and in such manner as should from time to time be declared by any by-law or by-laws, to be from time to time passed for that purpose."

I believe the first year in which there was a surplus was 1865. In 1860, a by-law or resolution had been passed under which the surplus went to a fund called the Mission

Fund, and under that by-law an aggregate sum of \$6,100 had been carried to that fund in the five years—1865, 1866, 1867, 1868, and 1869.

Then on 2nd March, 1869, a by-law was passed by which the apportionment of the surplus of the Clergy Commutation Fund was provided for. The leading feature of this scheme was that clergymen of eight years' and upwards active service in the diocese, who were not "on the Commutation Fund," were to receive each \$200 per annum, beginning with the clergyman of youngest standing, so far as the surplus should permit. If after paying each his \$200, there remained a surplus of \$200 or more, then each of such clergymen of ten years' standing, beginning with the senior one, was to receive an additional \$200 per annum.

There were some exceptions and details, which it is not now important to notice.

It was not until 1873 that the plaintiff became entitled to share in the surplus; but from the first day of April in that year his name appeared on the list of those who were to receive \$200 a year. This is spoken of in the minutes of the Synod as being placed "on the Commutation Fund," but the same phrase is used in other places, *e. g.*, in the by-law of 1869, to designate the original commuting clergy, and to distinguish them from the class which included the plaintiff, which makes care necessary in order to avoid misunderstanding.

In 1871 and 1874, by-laws were made which varied in some of their details the scheme of 1869, but left the right to the \$200 a year, and also the contingent right to a second sum of the same amount, substantially as it was.

In 1875 another by-law was passed. Its purport may be shortly stated as appropriating all accrued interest over and above the amount required for the payment of the original claimants and expenses, so as to provide allowances, on a defined scale, for superannuated clergymen; to make up the incomes of clergymen of eight years' and ten years' active service to \$800 and \$1,000 respectively; and to give over the residue, if any, to the Mission Fund.

This by-law by its terms took effect only from 1st April, 1876, and it ceased to have force (provided the next by-law was valid) on 22nd June, 1876, if in the face of the by-law passed on that day, which assumed to relate back to the first day of the preceding month of April, it can be treated as ever having taken effect.

On 22nd June, 1876, the by-law was passed which is the object of the plaintiff's direct attack. Objections are urged against its validity on grounds which may be described as technical. I shall pass these over for the present.

This by-law contained only three enactments. The first provided an allowance for clergymen superannuated after ten years' active service in the diocese; the second directed that all the residue of the surplus should form part of the Mission Fund; and the third declared "that this canon shall take effect from and after April 1st, 1876, and all provisions, by-laws and canons respecting the Commutation Fund and the surplus interest thereof, shall be and are hereby rescinded from and after the said date, and all grants made in pursuance of any such by-laws or canons shall from the said date absolutely cease and determine."

The broad ground taken by the plaintiff is that, under the trusts upon which the fund is held by the Synod, that body, while it has power from time to time by its by-laws to appropriate in such manner as it may see fit the surplus commutation money and all interest realized from it, so long as the money is not diverted from the support and maintenance of the clergy within the diocese, may so appropriate the fund or parts of it as to create vested rights which it cannot revoke or annul; and that the effect of the by-law of 1869 was to vest such rights in clergymen of the class to which the plaintiff belonged.

This is the view adopted by Mr. Justice Proudfoot, and the main question for decision is whether that view is correct or otherwise.

I shall read a passage from the judgment in which the learned Judge very clearly explains his opinion, as I find it at p. 367 of 29 Grant.

"The defendants do not deny that they hold the fund

upon trust for the support and maintenance of the clergy of the diocese; and I am disposed to give a very wide scope to their power to determine the *manner* from time to time by by-law, and to decide who shall be placed upon the funds, and for what time, year by year, or while a certain condition exists, or for life. The disposition in favour of the Mission Fund, as in the resolution of December, 1860, may, I think, be supported if an equivalent be brought into that fund from other sources for such sums as may have been expended on other objects than the maintenance and support of the clergy, as seems to have been done in this case. And so also, placing the fund at the disposition of the bishop and the society, as in the resolution of March, 1860, would seem proper enough, always provided that the disposition was in accordance with the trust. Nor do I think that the Synod are bound to distribute the fund in equal shares among the recipients; and so far as the fund may be unappropriated the terms and conditions on which the grant shall depend may be modified or varied. As at present advised, the by-laws of 1875 and 1876 seems to me unobjectionable, except in regard to the repealing clauses, so far as they affect persons already placed on the fund."

I understand the learned Judge to have regarded the by-law of 1869, in connection with the status and service of the plaintiff and other clergymen of his class, as creating a sort of contract to pay the stipulated sums on the events mentioned in the by-law, from which contract the Synod could not lawfully recede. This is more distinctly shewn in another part of the judgment, where, referring to the cases of *Gibson v. East India Company*, 5 Bing N. C. 262, and *Innes v. East India Company*, 17 C. B. 351, the learned Judge said: "A marked distinction between these cases and the present is that there the services had ceased, here they continue; there they were mere gratuities, here it is but an increased remuneration for continued service," etc.

If a contract can properly be held to have been entered into, it cannot, as I apprehend, be regarded as existing only with the clergymen who had come to "be placed on the fund," if by that expression those only are meant whose right to participate in the distribution of the surplus had matured before the repeal of the by-law. The plaintiff's

right matured on 1st April, 1873. If he is to be regarded as rendering service from that date onward, in consideration of the annuity which first became payable to him as of that day, we cannot refuse to attribute the same consideration to all the services rendered after the passage of the by-law of 1869, while he was yet looking forward to the time when, according to the terms of the by-law, his name, in turn, would be placed on the pay roll. When that by-law passed the plaintiff had not completed the eight years of service without which his claim to participate could not accrue; but he had been ten or eleven years in holy orders before the amount of the surplus was sufficient to permit him to share with his seniors. The contract, if properly held to exist, must have embraced the plaintiff and all the other clergy of the diocese, except the commuting body, whether their services were under or over eight years.

It must have included all whom the by-law justified in looking forward to being "placed on the fund," whether they had to wait for the accrual of a sufficient surplus, or for the lapse of the prescribed term of service, or for both events.

I have arrived at the conclusion, though not without some fluctuation of opinion, that there is not any sufficient ground on which to base the inference of a contract.

It is true that there would be an appearance of hardship if a clergyman, after doing faithful service for eight years or more, encouraged by the prospect of an important addition to his income under the provisions of the by-law, were told, when his right to participate had almost matured, that the Synod had decided to devote the money to the support and maintenance of some other clergyman. But, on the other hand, every clergyman necessarily knew that the fund to which his hopes were directed was one which the Synod had power to deal with from time to time, as the exigencies of the church required, or as might seem, in the particular circumstances of the time or of the diocese, the way in which it could be most advantageously applied to the support and maintenance of the clergy. It should

also be borne in mind that what was dealt with was not simply an existing fund which might be the subject of present appointment or alienation. It was a portion of the income derived from year to year, the amount of which was liable to vary, as investments were more or less productive, and as one after another of the commuting clergy ceased to be recipients and it was a fund which had no existence except in anticipation, until realized by the periodical payment of interest. No part of it could properly be said to be set apart for the use of any individual or class of clergymen except money actually realized, that is to say, surplus money on hand when the by-law was passed, or which came to hand while it was still in force. Beyond such sums as these, the right to any appropriation must have rested in contract. It is probably unnecessary to say whether or not the Church Society or the Synod had power to bind itself by contract to appropriate to designated individuals or classes the surplus money which might accrue in future years; but assuming the existence of such power, I am unable to hold that it has been exercised in the present instance.

Having regard to the purposes to be served in the administration of the Commutation Fund, and to the expressed terms respecting the dealings with it from time to time, the by-law must, in my judgment, be treated as an expression of intention which was and was known to all the clergy to be revocable.

The non-commuting clergy in the diocese at the time of the passing of the by-law may be said to have formed three classes: first, those who had already served eight years, and who being the seniors were entitled at once to receive the annuity; secondly, those who had also served eight years, but whose right to participate was deferred until a larger surplus had accrued; and thirdly, those of shorter standing who had to complete their eight years, and then wait till the money was sufficient to reach them.

The plaintiff belonged to the third class, but the by-law applied to the whole three.

Take the case of a clergyman within the first class. He would receive in 1869 his \$200, but he would receive it simply as so much money appropriated for his use from the surplus of that year, and not in any sense as the result of a contract between him and the society. His service had been rendered on a contract of a different kind, and, as far as we can say, with different parties. There was no relation between him and the Society by virtue of which, until the appropriation was made, he could have advanced a claim to any part of the money; and it seems to me indisputable that he could not have objected to the Society at once rescinding the by-law and so disposing of the next year's surplus that he should not share in it.

I am unable to see that the clergymen whom I have placed in the second and third classes acquired greater rights than those of the first class. If they did acquire such rights they must have done so by reason of their having to serve in expectation of, at some future time, receiving the bounty which those of the first class received at once; and after all, this would not distinguish any one of them from any member of the first class who, having received the first year's payment, looked forward to receiving the second in due time.

The weakness of the plaintiff's case arises from his inability to shew that his service was rendered in consideration of a promise to pay him this money. There was no bargain. There was no mutuality. He was not bound to serve, but was at liberty to cease his ministrations at his pleasure; and he was not, by reason of anything connected with these arrangements, relieved from liability to any proceeding which might interfere either with the continuance of his active service or with his good standing, on which two requisites the right to participate always depended.

The cases to which we were referred during the argument, and which are noticed in the judgment delivered in the court below, are illustrations or instances of the exercise of powers more or less analogous to that with which we are

dealing. I should not rely much upon any of them for assistance, because there are necessarily considerations arising in every case upon circumstances peculiar to itself. I may say generally, that nothing in those cases conflicts with what seems to me the true way of dealing with this case. If necessary to look for more direct authority I should rather refer to the principles discussed and acted upon in the recent case of *Alderson v. Maddison*, by Mr. Justice Stephen, as we find by reference to his judgment in 5 Exch. Division from p. 294; and by Lords Selborne, O'Hagan, Blackburn, and Fitzgerald, in 8 App. Cases at pp. 472, 485, 487 and 493.

The defendant in that case sought to establish a contract made by parol, by the plaintiff's ancestor, to devise an estate to her in consideration of her continuing, till his death, the service which, at the time of the alleged promise, she was rendering as his housekeeper. The representations by the deceased of his intentions to make the devise as a reward for the service were proved, and he had in fact executed a will in pursuance of his promise, which unfortunately for the defendant was not duly attested; and her service was also unquestioned. The jury found, in answer to a question left to them by the learned Judge, that the defendant was induced to serve the deceased as his housekeeper for many years without wages, and to give up other prospects of establishment in life, by a promise made by him to her to make a will leaving her a life estate in Manor House Farm, if and when it became his property. The action was brought by the heir for the title deeds which the defendant had retained; and she by her counter-claim sought specific performance of the agreement. Mr. Justice Stephen held the contract established, and held also that by her service there had been performance of her part of it, and that therefore the Statute of Frauds did not interfere to disentitle her to the relief she sought. In the Court of Appeal it was held that the Statute barred her claim (7 Q. B. D. 174), and a very instructive judgment was delivered on the subject of part performance, but the question of the

contract itself was not touched. In the House of Lords the ruling of the Court of Appeal on the question of part performance was sustained, the judgments delivered on that subject, particularly that of Lord Selborne, being of great interest and importance; and the fact of the contract was also discussed, and a different view was taken from that acted on in the Court of first instance. I shall not occupy time by quotations from the judgments. The difference of opinion was not on any question of principle. Mr. Justice Stephen recognized the necessity, as fully as it was recognized in the House of Lords, for the services having been rendered in consideration of the promise, and not merely in expectation of the promised bounty, but he seems not to have laid much stress on the circumstance that the service was really rendered under another contract, viz: that originally made for wages, which contract had continued to exist, notwithstanding that the defendant had not for many years insisted upon or received payment. I cite this case of *Alderson v. Maddison* not only for its own sake as containing an exposition of doctrines which I think very applicable to the case in discussion, but for the reference in the judgments to other cases, including the important case of *Jorden v. Money*, 5 H. L. Ca. 185, and others of its class, and the decision of Vice-Chancellor Stuart, in *Loffus v. Maw*, 3 Giff. 592, by which Mr. Justice Stephen seems to some extent to have been guided, but which was disapproved by the Lords.

A question was made in the Court below concerning the regularity of the proceedings of the Synod in passing the by-law of 1876. The argument on this point was based upon some provisions of the constitution adopted in 1875 by the Synod. One article of the constitution (No. 16) provides for the appointment of a standing committee, and assigns to it, amongst other duties, that of preparing in due form all such matters as the Bishop may desire to have brought before the Synod, and all such other matters as may be forwarded to the committee, through the Secretary, by any member of the Synod, previous to the first of May

in each year, and of having printed such portion as may appear to the committee expedient. The same article directs that "a circular containing a statement of such business to be submitted to the Synod shall be forwarded to each clergyman and representative two weeks before the meeting of the Synod, which business shall stand first in the order of the day." Then the 24th article declares that "every proposition for an alteration in the constitution or canons of the Synod must be sent to the standing committee, to be forwarded to the members of the Synod; and no alteration shall take place unless agreed to by majorities of two-thirds of the Clergy and Laity respectively."

The plaintiff had given regular notice of his intention to propose at the meeting of the Synod in 1876, amendments to Canon 19, "On appropriation of the Commutation Fund," (p. 186 of report of 1875) which was the by-law of 1875, and he moved the Synod in accordance with his notice, his motion being duly seconded. It was then, as appears by the minutes which are in evidence, "moved in amendment by Rev. Rural Dean Logan, seconded by William Grey, Esquire, XIII. Resolved that clause 2 of the Canon of 1875 be struck out, and the following substituted:" then giving the provisions which became the by-law of 1876, and which differed from the amendment proposed by the plaintiff.

The objection is that this could not be done in the face of the constitution, because no notice had been given of Mr. Logan's alteration of the Canon; and that his motion was not in amendment of that of the plaintiff, because it really substituted a Canon different in principle for that which the plaintiff proposed.

Mr. Logan's Canon was adopted by what was understood by the Bishop and the Secretary to be the unanimous vote of the Synod; but there is evidence that there were, or would have been if the negative had been formally voted on, two dissentient voices, namely, those of the plaintiff and his seconder.

I am unable to see any force in the technical objections.

No authority has been shewn for the Court interfering in a matter of the kind. The mode in which the Synod was to conduct the business of making or amending its by-laws did not enter into the trust under which it was empowered to direct the appropriation of the surplus money by by-laws passed from time to time.

But, apart from this consideration, there is nothing in the rules I have quoted from the constitution to prevent the Synod doing validly, without previous notice, those things of which it directs notice to be given. The rules are directory only; but even if they were of greater force, let us see what they amount to: Article 24 says that every proposal to alter a Canon must be sent to the standing committee to be forwarded to members; article 16 prescribes how that committee is to prepare for the Synod and forward to members a notice of the matters sent to the committee, and then declares what the consequence shall be, viz: that that business shall have precedence of other business, not that no other business shall be done.

The Synod would, no doubt, be justified in declining to consider an important matter with regard to which its rules had not been observed; but if it chose to entertain it, I am not aware on what principle a Court could be called upon to restrain its action; still less can it be said that such action would be void.

It is evident that, in the case before us, the Synod did not think its rules had been violated; and there is nothing in the minutes, or in the evidence, to indicate that the plaintiff at that time thought so. My own opinion is, that the proceeding was regular enough. Notice had been given to the members of the Synod that their attention would be invited to the subject of the disposition of the Commutation Fund surplus by the plaintiff, who supplied them with the details of his scheme. They considered the subject, but they preferred a different scheme; and that scheme went into force, and was acted upon for years before this action was brought.

Another point made was that the Synod had not power

to vary what the Church Society had done in designating how the surplus should be dealt with. The Act of 1874, under which the Synod is incorporated, gives the Synod power to do all that the Church Society could have done with regard to these trust moneys.

I am clearly of opinion that we should allow this appeal with costs, and dismiss the plaintiff's action, with costs.

PETERKIN V. MCFARLANE.

Mortgage or no Mortgage—Purchase with agreement to re-sell—Registry Act—Notice.

In August 1866, the plaintiff in consideration of \$500, which she asserted was by way of loan, conveyed to M. 100 acres of land by a deed absolute in form. The plaintiff alleged that M. agreed that if the money were repaid during his lifetime, he would accept the same and reconvey the land. The plaintiff in 1871 applied to M., to accept the amount of principal and interest remaining due, (she alleging that she had paid \$10 on account thereof), and reconvey the land to her, which request M. refused to comply with. Subsequently, and in June of that year, M. sold and conveyed the land to R. & McK., for \$1,200, and they in June, 1872, sold and conveyed to B., for \$2,000, alleged to be its full value, taking a mortgage for part of the consideration money, which they transferred for value to one W. (not a party to the suit). During the time R. & McK., held the property, they, with the knowledge of B., had cut and disposed of large quantities of wood and timber growing thereon, without any attempt on the part of the plaintiff to restrain them. In November, 1873, the plaintiff instituted proceedings in Chancery seeking to redeem, alleging that the deed she gave was intended as a security merely, and a decree was pronounced in her favor, Spragge, C. being of opinion that the transaction was in reality one of mortgage and that on the pleadings set out below, the defendants R. & McK. and B., had distinctly admitted the allegations of the bill in this respect. On appeal, this Court being equally divided the appeal was dismissed, and the decree for the plaintiff stood affirmed.

Per HAGARTY, C.J., and BURTON, J.A.—At most the transaction was one of purchase by M., with a verbal undertaking on his part to re-sell on payment of what should be found due.

PATTERSON, J.A.—While entertaining grave doubts of the plaintiff's right to recover, thought that the evidence did not establish the fact of B. having purchased without notice of the plaintiff's alleged right to redeem; and in view of the fact that Spragge, C. who heard the evidence considered that the fact of notice was fully established, thought the decree should be affirmed.

Per PROUDFOOT, J.—The transaction was in reality a security only for the advance of money, and B., bought with actual notice of the plaintiff's claim, and therefore she was entitled to redeem.

Per HAGARTY, C.J.—This Court is allowed and required by law to give judgment "according to the very right and justice of the case," and up to the last moment has the right to make any amendment proper for the attainment of that end. Therefore where the defendants had by their answers admitted the truth of certain paragraphs of the bill which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence.

Per HAGARTY, C.J.—If “an equitable lien, charge or interest” be created by deed or by any writing capable of being registered actual notice of such deed or instrument will, under the 67th section of the Registry Act, 31 Vict. ch. 20, (O.) prevent the effect of priority of registration. But as to equitable liens, &c., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition of real property, unless in cases of actual moral fraud a stringent observance of the registry law is the wisest rule to adopt.

Per PROUDFOOT, J.—The fact that a man who knows of another's title to land, buys in such a way as to get a title on the register and then sets the owner at defiance is such a clear case of active fraud as would deprive him of the protection of the Registry Act.

Per PATTERSON, J.A., and PROUDFOOT, J.—The ruling in *Forrester v. Campbell*, 17 Gr. 379, that the Registry Act of 1865. (sec 66), does not avoid an equity as against a subsequent instrument though registered, if taken with notice approved of.

APPEAL from Chancery.

The original bill was filed by Catherine Peterkin against James McFarlane, Colin H. Rose, Duncan McKenzie, and Thomas Burke, for the purpose of redeeming certain lands conveyed by the plaintiff to James McFarlane on the 31st of August, 1866, by an absolute deed in fee simple, but which it was alleged had been so conveyed by her by way of security only for the repayment of \$500 advanced by McFarlane to the plaintiff.

The bill further stated that in June, 1871, the plaintiff had arranged to sell one half of the lands so conveyed in order to raise an amount sufficient to pay the \$500 and interest, on account of which the plaintiff had paid to McFarlane the sum of \$10 only, and she proposed to McFarlane to do so; or to borrow the money if he required it, upon security of the land and redeem it from him, but that he then informed the plaintiff that he would not allow her to either sell part of or mortgage the land, but that when she obtained the money otherwise he would reconvey to her; and that she had subsequently offered to pay McFarlane the full amount of principal, interest and costs, but he refused to accept the same, and “then professed and pretended that the said indenture being absolute in form he was not bound to receive the said money or to treat said indenture as a security, and claimed that having absolute title thereunder, he was not bound to reconvey to the plaintiff on payment of said money and interest; that other parties took advantage of him when they could, and that he was obliged to do the same with the plaintiff.”

The bill further stated that by indenture of 13th June, 1871, McFarlane, in consideration of \$1,200 conveyed the said lands to Rose and McKenzie, who prior to such conveyance had full knowledge and actual notice of the claim of the plaintiff, and of her right to redeem said lands, and that they, Rose and McKenzie, after having cut and removed trees, timber and wood from the land to the amount of \$2,000, conveyed the same to the defendant Thomas Burke, who prior to the purchase, sale and conveyance to Rose and Mackenzie, and by them to himself, had full knowledge of the plaintiff's claim and right of redemption.

The bill further stated that the defendants Rose, McKenzie, and Burke contended that they were purchasers for value without notice of the rights of plaintiff; and that by indenture of mortgage dated 29th June, 1872, the defendant, Thomas Burke conveyed the said lands to Rose and McKenzie to secure \$1,050 and interest, and which was duly transferred by them to one Zenos W. Watson by an assignment dated 12th July, 1872.

The prayer of the bill was for an injunction to restrain waste upon the said lands, and for relief in accordance with the statements of the bill.

During the progress of the action the defendant McFarlane died, and one John P. Alma was appointed administrator of his estate, and Alma having also died Charles E. Pegley was appointed in his place by the order of the Court of Chancery of 7th February, 1878, and John Burke was, by an order of that Court of the 23rd of January, 1878, added as a party defendant, he having acquired some estate or interest in the property.

The action was brought down for hearing at the sittings of the Court of Chancery at Chatham on the 5th of May, 1875, before Spragge, C., who, after taking time to look into authorities, on the 18th of October, 1876, made a decree in favour of the plaintiff as prayed, with costs. From this judgment the defendant Thomas Burke appealed to this Court, when the appeal was allowed as reported

ante vol. iv., p. 25. The order drawn up thereon, amongst other things directed :

" That the appellant be allowed to file a supplemental answer setting up the defence of the Registry Laws or such other defence as he may be advised, and that for that purpose the replication filed in the Court below be withdrawn if necessary ; and that the plaintiff be allowed to proceed to a second hearing of the cause in the Court below : all costs of the former hearing and the subsequent proceedings in the Court below to abide the result of such second hearing, so that should the plaintiff succeed in such second hearing she will be entitled to receive all such costs there ; and in the event of the appellant succeeding on such hearing he will be entitled to receive all his said costs incurred in the Court below."

The plaintiff thereupon appealed from this judgment to the Supreme Court of Canada. That Court affirmed the judgment pronounced by this Court, and dismissed the plaintiff's appeal, with costs.

The defendant Thomas Burke thereupon put in a supplemental answer in the Court below, denying notice of the claim of the plaintiff to the lands, and setting up that he became the purchaser of said lands, paid the money and gave the mortgage in the bill mentioned in good faith, in reliance upon the title to the said lands as shewn by the records of the Registry Office, in which the title thereto appeared as a registered title ; claimed the protection of the registry laws, and that he was a purchaser for value without notice.

The defendant John Burke also filed an answer denying the allegations in the bill and relying on and claiming the benefit of all the defences raised by his co-defendant Thomas Burke.

The case was thereupon again brought on for the examination of witnesses and hearing, on the issues so raised by the defendants Burke, at the sittings of the Court of Chancery at Chatham on the 31st of March, 1881, before Spragge, C., who ruled at the opening of the case that it was re-opened as to the question of notice, and that that was the only issue before the Court.

Boyd, Q. C., and Atkinson, for the plaintiff.
Moss and Scane, for the defendants.

After looking into the authorities.

June 11th, 1881. SPRAGGE, C.—The defendant Burke having appealed from my decree giving to the plaintiff a right to redeem the land sold by McFarlane to McKenzie and Rose, and sold by them to Burke, and having been allowed by the Court of Appeal to set up the registration of his title, by supplemental answer an indulgence which I had refused to him, the cause was again carried down to a hearing before me at the last sittings of the Court at Chatham; when further evidence was given on both sides.

Before dealing with the further evidence I desire to say that I refused the indulgence asked for by Burke, because I was satisfied by the evidence which was taken *viva voce* before me, that the defence set up was not a righteous one. There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence upon the subject of notice greatly preponderated in favour of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanour, and the many circumstances which aid a Judge of fact before whom evidence is given to form a correct judgment as to its truthfulness, and the weight properly due to it.

At the recent hearing, I did not, any more than at the former one, consider it to be an open question whether or not the dealing between the plaintiff (by her agent James Peterkin) and McFarlane, was a security for the repayment of an advance of money. This fact is so distinctly admitted by the answer of Rose and Burke, who answered together, and by the separate answer of McKenzie, that no other evidence of it could be required. Evidence of the fact was indeed given, but I think upon all but one occasion it was given incidentally in the giving of evidence of notice to McKenzie and Burke. I have no reason to suppose that the admissions contained in the answers were made by mistake.

The answers are sworn, and I see no reason to doubt that the admissions were made because the fact admitted had been ascertained to be true. At the recent hearing, besides the evidence then given, the evidence given at the previous hearing was before me. My Brother Proudfoot, in his judgment in the Court of Appeal (p. 48) has commented upon the answer and the evidence of McKenzie. His

comment is so accurate and just that I cannot do better than adopt it.

At the recent hearing the plaintiff and James and Alexander Peterkin reiterated the evidence given by them at the previous hearing.

A new witness upon the point of notice to McKenzie was Norman McLean. What he says in substance is, that he was present when McKenzie wanted one McDonald to join him in purchasing the land in question. That McDonald declined, as the Peterkins had a claim on the place; but McKenzie said they could buy out the Peterkins; but McDonald replied that he would not put his money into it unless there was a clear title. The witness supposed that this conversation was seven or eight years ago, probably eight last spring. It was probably earlier, before Rose joined McKenzie in the purchase. The evidence is material in this, that it shews that it was present to the mind of McKenzie, or was brought to his mind on this occasion, that (as it was termed) the Peterkins had a claim, or at least were understood to make claim to or upon this property at that time. McKenzie knew already what was the nature of that claim.

The remark attributed to Burke, (and I have no doubt truly attributed to him, notwithstanding his denial) that no one but McKenzie would be mean enough to make the purchase, is also material, for it assumed that McKenzie knew when he made the purchase that the plaintiff had a redeemable interest in the land, an interest which he appears to have supposed was extinguished by McFarlane's sale.

McKenzie was examined at the recent hearing, and upon cross-examination admitted that he heard that James Peterkin had a promise from McFarlane to give back the land on payment of \$500 that he had advanced; he says he heard that James had conveyed to the plaintiff. He was called to prove that on the occasion of his cutting the stake (as to which a good deal of evidence was given), and when his right was angrily questioned by Alexander, the plaintiff's husband, he put it to James whether he had not given permission, and that James admitted that he had, but said that the land now belonged to McFarlane. McFarlane's name was probably used, as it had been agreed between him and James that no timber should be cut; but in what passed I feel satisfied there was no admission expressed or understood that the plaintiff had parted with

all her interest in the land. McKenzie knew from the plaintiff's own mouth that she had not, and her husband's angry question of his right to cut was an assertion of right to forbid it.

Material further evidence of notice to Burke was given at the last hearing. I give shortly the substance of the evidence from my notes.

Seth Turner says, that he had an idea of purchasing the place himself, and got advice from Mr. Atkinson, the solicitor; that he afterwards heard that Burke thought of purchasing, and went to him and advised him as a friend not to purchase; that the Peterkins (his own idea was that it was James Peterkin) had a claim upon the land, and that he had been advised not to purchase.

Eliza Stewart said that she knew Burke from childhood; that she told him he had better not purchase without seeing the plaintiff; that the plaintiff had told her that they could not get title without her; that she, the plaintiff, had raised money upon the land.

John Stewart, the husband of the last witness, says (speaking, I suppose, of the same occasion,) that his wife advised Burke not to buy; that he could not get a good title unless the plaintiff signed. The witness says that Burke made no answer except to speak of plaintiff by a bad name, too bad, he says, to repeat in Court, women being present. He thinks this was four or five months before Burke purchased the place.

George Kime says that he was present when Burke and Alexander Hardy were talking together, when Burke said that he had consulted Mr. Atkinson and also Mr. Scane about purchasing this land; that Mr. Atkinson had advised him not to purchase, and that Mr. Scane advised him that he could.

Alexander Hardy, who had been examined at the former hearing, also says that he had another conversation with Burke besides that spoken of by Kime; that in this other conversation Burke said that Mr. Atkinson had advised him that he could not purchase on account of the claim of the Peterkins; that Mr. Scane had advised him that he could; that it was only a question between Mrs. Peterkin and McFarlane. He says both these conversations were before the previous hearing; that he did not know at that time that it was a material question whether Burke had notice of the plaintiff's interest. At the former hearing his evidence was directed to the fact of statements

by McFarlane that he held the land only as security for the repayment of money advanced.

Burke was present in Court while this evidence was given, but was not called as a witness for himself, his Counsel saying that they relied upon the evidence given by him at the former hearing. He was called as to one point by the plaintiff, but said nothing as to the evidence which had just been given in his presence.

A witness, James Allen, was called and said that the plaintiff told him some four or five years ago—since the commencement of this suit—that she did not know whether she had any claim on the land; on cross-examination, that she said if she could break the deed she was sure of the place. This really amounts to nothing.

The evidence given upon the question of notice—as well that given at the former hearing as that given at the recent hearing—is more or less material. It is true that Lord Kingsdown, in *Barnhart v. Greenshields* 9 Moo. P. C. C. 36, stated the rule to be “that a purchaser is not bound to attend to vague rumours, to statements by mere strangers, but that a notice in order to be binding must proceed from some person interested in the property.”

I think that this rule has not in this country been rigidly adhered to. It certainly has not in the United States, as appears by the cases cited in the American notes to *Le Neve v. Le Neve*, 2 W. & Tud L. C. 146 (Am. Ed.). In our Provincial Registration Acts the word used is “Actual Notice.” The 68th section of the Act of 1868 makes, indeed, no exception; but it has been held in England and in this Province, that no exception in words is necessary, but that where a purchaser has such notice as to affect his conscience and make it inequitable to him to purchase, and take and register a conveyance to himself, when he has knowledge that its effect will be, if allowed to prevail, to defeat a title legal or equitable known to him to exist in another, his conveyance will not be allowed to prevail against such title in another. And the judgments in the Court of Appeal when this case was before that Court proceed upon the assumption that Burke would be affected with notice if proved against him. Upon any other hypothesis it would have been futile to have remitted the cause back to this Court for further evidence upon that point.

Notice to McKenzie is proved direct from the plaintiff herself, with a good deal of corroborative evidence from other witnesses. Actual notice to Burke is proved to my

mind quite as satisfactorily. He learned what claim was made by the plaintiff from herself and from James Peterkin. And the evidence given at the recent hearing, in addition to that at the former hearing, proves that he had knowledge, not from one quarter only, but from several, of the plaintiff's claim, and of its nature. His own admissions to Kime and Hardy are corroborative of the same fact. To put it at the lowest, the evidence given at the recent hearing makes it impossible to believe the assertion of Burke that he had not, before he purchased, notice of the plaintiff's claim. It has been said in this case as it has been said in other cases, that it is almost incredible that a man should purchase when he knows of a claim in another to or upon the same land. But it is not every man that knows of the equitable doctrine that where a man has such notice of title in another as would make his purchase inequitable, an exception is created thereby to the effect given generally to the Act of Registration. Burke is not the first man who has thought that (to use his own words) "If a man has a clear deed he can give a clear deed;" and who, to his cost, has acted upon that belief. That belief, and reliance upon advice which he understood (perhaps mistakenly) to have been given to him, that he could purchase, are, I can scarcely doubt, the key to his conduct.

In my judgment, the evidence has brought home both to McKenzie and to himself notice of the plaintiff's claim, and I think his abstaining from giving evidence at the recent hearing may properly be attributed to a consciousness that he could not deny the evidence given upon that occasion.

My conclusion is, that the plaintiff is entitled to such relief as was adjudged to her at the former hearing, and that the subsequent orders made in this Court were right.

The costs are disposed of in the order made by the Court of Appeal.

The decree drawn up in pursuance of this judgment was as follows :

" 1. This Court doth declare that at the time the said defendant Thomas Burke purchased the lands and premises in question herein, he had notice and knowledge of the plaintiff's claim to and right of redemption of the said lands and premises, and that he is not a *bonâ fide* purchaser thereof for value without notice, and doth order and decree the same accordingly.

2. And this Court doth further declare that the decree pronounced herein on the eighteenth day of October, 1876, ought to be confirmed and established, and doth order and decree the same accordingly.

3. And this Court doth further order and decree that the said Thomas Burke do pay to the plaintiff her costs of this hearing forthwith after taxation thereof."

The defendants Rose, McKenzie and Burke thereupon appealed to this Court and the appeal came on to be argued on the 23rd and 24th of January, 1883. *

Moss and Scane, for appellants.

Atkinson and W. Cassels, for the respondent.

The other facts in the case and the points relied on by counsel appear sufficiently in the judgments.

January 2nd, 1884. HAGARTY, C. J.—I am of opinion, on the evidence, that the dealing between the plaintiff and the deceased McFarlane was an absolute sale and purchase of the 100 acres for \$500, and that the purchaser verbally promised to convey it back any time during his life. This was in 1866.

The only direct witness to the transaction is James Peterkin. He says he (witness) did not suggest or propose that there should be a mortgage, nor was any rate of interest spoken of. "He offered \$500 for 100 acres of land—that is, he would buy 100 acres for \$500. He was to go into possession of the land until it was redeemed. There was no provision made that McFarlane was not to cut timber at that or any other time," nor was any arrangement made about taxes. This witness never spoke to McFarlane about the land for four or five years after this.

Mrs. Peterkin, the plaintiff, said that she had no talk with him about the land till about a week before he sold it, which was in June, 1871.

Much difficulty seems to have been created by the manner in which the answers of three of the defendants are drawn, admitting, as plaintiff contends, that this dealing with McFarlane was substantially a lending of money on

**Present*.—HAGARTY, C. J., BURTON and PATTERSON, JJ. A., and PROCTOR, J.

security of this land, and that the deed, though absolute in form, was intended by the parties only as a mortgage.

McFarlane died before answer, and except from admissions said to have been made by him in conversation with parties, we have not the advantage of his version of the matter.

At the hearing the plaintiff at once went into evidence of the precise dealing between her and McFarlane, shewing its true nature, and, as I have already stated in my judgment, disclosing not a mortgage transaction, but an absolute sale and purchase and a verbal promise to re-sell or reconvey during the vendee's life.

I am of opinion that the judgment should have proceeded not on the transaction as it is said to be admitted in the pleadings, but as the plaintiff's witnesses proved it to have been.

Either on the motion of either party, "or without any such application," (R. S. O. c. 50, sec. 270) all such amendments as may be necessary for determining the real question in controversy, and best calculated to secure the giving of judgment according to the very right and justice of the case, should have been made.

I think this was a case emphatically calling on the Court to make any amendment necessary to meet the facts in evidence, and at any stage of its progress this may be done.

The admissions in the answers coming from persons having no personal knowledge of the truth, should not be held to admit more than the evidence warranted.

This is not the case of an admission made by a person of a fact the truth of which is known to himself, and which he afterwards desires to retract. Here the defendants could know nothing of the dealings between plaintiff and McFarlane, except from what others told to them. Nor is it the case of a defendant admitting in his answer that the contract as alleged had been made, and then asking to amend by pleading the Statute of Frauds.

I am of opinion that on the evidence this was not a mortgage transaction, nor a borrowing or loan of money.

If it were the latter there ought to have existed a right of repayment. I see no power in McFarlane to enforce payment.

Even if there had been a binding agreement executed contemporaneously, binding McFarlane to reconvey at a named price during his lifetime, it would not merely on that account be a mortgage transaction.

The subject is very fully discussed in the notes to the well-known case of *Howard v. Harris*, Ed. 1877 of White & Tudor, p. 1065. In *Alderson v. White*, 2 D. & J. 105, Lord Cranworth says: "The rule of law on this subject is one dictated by common sense, that *prima facie* an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is what, upon a fair construction, is the meaning of the instrument." (See also *Shaw v. Jeffery*, 13 Moo. P. C. at p. 461.)

The highest ground on which plaintiff's case can be put is that she sold absolutely, trusting to a verbal promise to buy back within a named time. There is no suggestion here of any contrivance or pressure on the vendee's part, or that any advantage was taken against her.

We can find none of those circumstances which are usually advanced to prove that a mortgage only was intended; no sum was named for repurchase or rate of interest, no possession or occupation left to vendor, no interference with vendee's rights to cut timber, &c., nothing in fact to shew that McFarlane was not to treat the land as absolute owner.

If it were not a mortgage, but only a binding agreement to reconvey on a named consideration, the vendee might cut timber enough to pay off his original purchase money, and the vendor could only urge his right to the repurchase for the specified price.

Here we are asked to hold that instead of a named price plaintiff should only have to pay the original \$500

and interest at a nominal rate, and that the vendee would have to account for timber, &c.

Coote, on Mortgages, (edition 1880) 18, 20, 21, 22, states the law as in *Alderson v. White*. See also 1 Fisher on Mortgages 13, 14 *et seq.*

On principle and authority I am of opinion that this was not a mortgage transaction.

Then as to the promise to resell.

The promise of course could not be enforced under the statute. But (it may be suggested) the vendee might not and need not have availed himself of the statute. He died before answer, and his personal representative says nothing whatever. His sale of the property as its absolute owner seems the best answer to this. He considered himself not legally bound, and took advantage of such being his position in the most unequivocal manner.

If my view of the dealing be correct, of what then had the parties notice who purchased from McFarlane and placed their title duly on record?

They had notice only that McFarlane had purchased the property absolutely, had made a promise to resell it to plaintiff which was not binding on him, and that he had taken advantage of his not being legally bound, broken his promise, and sold absolutely to them.

If my conclusions of fact be right there would seem to be an end of the claim.

It will hardly be argued that a registered title can be defeated by the knowledge that the proposed vendor had verbally promised to sell to another or to give the first offer of it to another, and had chosen to break his word.

A Court of Law and not a Court of Honor must decide the rights of the parties in such a case.

If the plaintiff's statement be true that in June, 1871, James Peterkin offered to pay McFarlane his money just before the sale to Rose and McKenzie, why did she wait nearly two and a half years, till November, 1873, before filing this bill, with the knowledge of the sale in June and the second sale a year after to Burke? It would hardly

be for want of means if she was able to have tendered the money to McFarlane prior to any sale by him.

If the plaintiff's argument prevail, then the effect of such a promise as was proved here, known as it is said to the whole neighborhood, would have the effect of tying up the land and preventing a sale thereof for forty years, if the life of the promiser lasted so long.

If I be right in my view of the facts it is not necessary to consider the question of registration. If not, then I must consider the effect of the statute.

Section 67 of the Act then in force, 31 Vict. ch. 20, says: "Priority of registration shall in all cases prevail unless before such prior registration there shall have been actual notice of the prior instrument by (Query to ?), the party claiming under the prior registration," Section 68: "No equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns."

In a carefully considered judgment of Mowat, V. C., 17 Gr. 379, *Forrester v. Campbell*, it was held that these words could not have had the effect contended for, chiefly, as I read it, because many or most equitable liens or interests in land are created by deed, and the preceding clauses clearly postpone the prior registration as against an unregistered prior deed of which there was actual notice.

This decision is approved and followed by Strong, V. C., in *Wigle v. Settrington*, 19 Gr. 512.

In a case of *Millar v. Gray*, 23 C. P. 51, decided soon after these cases, the decision did not expressly turn on this point. *Forrester v. Campbell* was cited with other cases. It seems to have been assumed by the then Chief Justice of that Court, and still more strongly and explicitly by Mr. Justice Gwynne, (p. 55), who says: "As this 68th section was introduced for the purpose of thus depriving equitable charges of the exceptional protection from the operation of the Registry Laws which they before enjoyed, so it seems to me this 67th section was introduced with the intention

of adopting as part of the statute law that doctrine of equity which was theretofore the law of the Court of Chancery only, which avoided as fraudulent the registration of a subsequent deed executed to a person having notice of a prior deed conveying the same land to another, although such prior deed was not registered."

It appears to me that we cannot expunge this 68th section from the Act and declare that it has no meaning whatever,

Its language is very clear, and I think it our office to give effect to it if we can.

It is undoubtedly right to read it in conjunction with the preceding sections, and to give it an interpretation in harmony (if possible) with them.

I can suggest that we may prevent any clashing of these provisions by holding if an "equitable lien, charge or interest" have been created by deed, or even by any writing capable of being registered, that actual notice of such deed or instrument would, under the 67th section, prevent the effect of priority of registration.

But as to equitable liens, charges, or interests, evidenced only by parol—as in the case before us—or as to such interests as a vendor's lien for unpaid purchase money, is there any reason for our denying that the Legislature has emphatically excluded them from affecting a duly registered title?

I can adopt this view of the statute without trenching on the rights of a Court of Equity to interpose in a case of actual or active fraud—moral fraud, not merely the purchasing on the special faith of the Registry Law, as is proved to have occurred here, of an apparently clear registered title under legal advice.

I have no alternative except either to utterly ignore this clause or to apply it so far as I can to a case like the present.

I entertain a very strong opinion, from a long experience of the legal business of the country, that a stringent observance of the Registry Law, except in cases of actual.

moral fraud, is beyond question the wisest rule in the disposition of real property.

I think the modern cases exhibit an increasing desire not to allow priority of registration to be lightly interfered with, and also to abandon as untenable some grounds which found favor in the sight of very learned Judges in earlier years.

I might refer to the instructive remarks of the Law Lords in *Agra Bank v. Barry*, in L. R. 7 H. L. 147.

Whatever may be the final issue of this most unfortunate case, the result in a pecuniary view must be deplorable. The original matter of dispute was a right to redeem land worth perhaps \$1000 burdened with a debt of \$600 or \$700. The case has been twice heard in the Court of Equity, twice in appeal to this Court, and once to the Supreme Court at Ottawa on an interlocutory appeal.

If my view of the actual facts be correct I should regard with much regret my being compelled to base my decision on an untrue state of facts, because defendants unwittingly admitted a statement in the bill to be true of which they only knew by hearsay.

I do not think that the present state of the law forces me to a duty so distasteful.

I think I am allowed and required by law to give judgment "according to the very right and justice of the case," and up to the last moment we have the right to make any amendment proper for the attainment of that very desirable end.

I think the appeal should be allowed with costs, and the bill be dismissed, with costs.

BURTON, J. A. The former appellant, Thomas Burke, having been allowed by the judgment of this Court to amend his pleading and set up the Registry Law, filed a supplemental answer in these words: "2nd. I say that at and before the time when I purchased the said lands and paid a portion of the said purchase monies, and in order to secure the balance of the said purchase moneys gave a

mortgage to the said Rose and McKenzie, which I am informed and believe, and charge the fact to be, they have since by deed assigned and transferred. and in and by such deed of assignment and transfer conveyed the legal estate in the said lands to one Watson, for the balance of the purchase moneys of said lands, I had no notice or knowledge of the plaintiff's alleged claim to the said land or any part thereof, and I became the purchaser thereof, and paid the said monies and gave the said mortgage, in good faith, in reliance upon the title to the said lands, as shown by the records of the Registry Office, in which the title thereto appears as a registered title; and I submit and claim that under the circumstances herein stated I am a *bonâ fide* purchaser for value without notice, and I claim the benefit and protection of the Registry Laws, and all other laws in favour of such purchasers in force in this Province."

The case went again to a hearing before the same learned Judge who heard it on the first occasion, and he has again found in favour of the plaintiff, and a decree has been drawn up to the effect that Thomas Burke at the time of his purchase had notice and knowledge of the plaintiff's claim to and right of redemption of the lands and premises in the pleadings mentioned, and that he is not a *bonâ fide* purchaser thereof for value without notice.

I adhere to the opinion which I expressed at the former hearing that we could not lightly interfere with the decision of the learned Judge in his estimate of the credibility of the witnesses, and that we are confined to the question of whether there is such evidence of actual notice as taken in connection with the facts admitted or proved as is sufficient to defeat Burke's registered title.

In England there has been a fluctuation of opinion; some of the earlier decisions holding that actual notice is not required, but that it must nevertheless be "clear and distinct, and amounting in fact to fraud," or, as it is sometimes

expressed, "a clear, broad plain equity;" and whilst I agree with the learned Chief Justice that the salutary rule laid down by that very eminent jurist Lord Kingsdown in *Barnhart v. Greenshields*, viz.: "that a purchaser is not bound to attend to vague rumors, to statements by mere strangers, but that a notice in order to be binding must proceed from some person interested in the property" has not, in this country or the United States, been rigidly adhered to, I do so with a feeling of regret, as that rule, and the expression of opinion so frequently given in recent times by Judges of great eminence, that it is highly inexpedient to extend the doctrine of constructive notice, have my entire concurrence. The Legislature have, however, with us, declared that nothing short of actual notice shall affect a person claiming under a registered title, so that the inquiry is under our Statute very much narrowed, and the recent decisions of *Agra Bank v. Barry*, 7 H. L. 147, and *Lee v. Clutt*, 24 W. R. 942, would seem to shew that the English Courts have finally decided that nothing short of actual notice is sufficient to defeat a registered title.

When this case was previously before us the question to which our attention was mainly directed was the propriety of allowing an amendment, which had been applied for at the hearing, so as to allow the defendant to set up the Registry Laws, as it was alleged that, whether he had notice or not before his purchase, he clearly had before he had paid the whole of his purchase money, and so, by one of those doctrines of a Court of Equity, which the Legislature has since wisely abolished, he would be affected with notice. I did not then consider, and no question was raised on the argument of the present appeal, as to the effect of section 81 of our Registry Law, counsel assuming, I suppose, that the decisions of the Court of Chancery, following *Forrester v. Campbell*, 17 Gr. 379, have settled the law as to the construction of that section.

It has been said that when the Courts assumed to enforce equitable rights depending upon contract, and in the case of contracts affecting land against others than the man

who entered into them, notwithstanding the Registry Laws, there was no attempt to interfere with or to repeal the Acts of Parliament, but that giving the Acts their full force, that is to say, leaving the estate to go in priority to the man who had registered, still, if that man had notice of anything by which his grantor had bound himself, he was bound by it.

Still there is no question that many Judges have doubted the wisdom of breaking in upon the Registry law, and allowing purchasers who have purchased and registered on the faith of that law to have their titles disturbed upon an allegation which they may find it difficult to meet, that they had notice of some unregistered instrument or of some such equity as is here alleged. And when we find the Legislature interfering and saying in effect, we will, to a certain extent, recognize these decisions, but with this qualification, that the notice to postpone the registered deed of a purchaser for value to a prior unregistered deed shall be actual, not constructive notice, and in the same enactment, declaring that "no equitable lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party, his heirs or assigns," without any reference to notice, I should, were this matter *res integra*, hesitate long before coming to the conclusion that the section was intended to bear any other meaning than what is fairly and clearly expressed upon its face; and that having in other sections referred to actual notice the maxim of *expressio unius, &c.*, would apply.

The point was not, however, taken either on the former hearing or on the recent argument, and I am not prepared to consider a question which has been decided and acted upon for many years in the Court of Chancery without having the matter fully discussed by counsel. I have a very strong conviction that it was intended by this enactment to relieve purchasers from troubling themselves about a claim of this nature, which the parties have not chosen, if it exists in fact, to reduce to writing and bring

upon the Registry, and I cannot leave the subject without quoting a few remarks of Baron Bramwell upon a similar enactment, in the hope that they may come to the notice of the proper authorities, and induce them to legislate in the direction indicated. After referring to the injustice of a purchaser being dragged into litigation when, having done his best to ascertain whether an alleged contract existed or not, and having come to the conclusion that it did not exist and could not be enforced, finds that his conscience is, notwithstanding, said to be affected, and finds himself involved in a law suit.

"I cannot help thinking," that learned Judge says, "that the Legislature in these Acts of Parliament intended to prevent the occurrence of what is to my mind the gross injustice which I have pointed out. I think what was intended was this, unless the annuitant registers his annuity a subsequent purchaser shall not be troubled with any inquiry as to whether his conscience is affected or not. A place is pointed out where the annuitant may register his interest if he likes, and if he does not he must take the consequence of a subsequent purchaser getting a better title against him. I doubt very much whether the principle of Courts of Equity ought to be extended to cases where registration is provided for by statute. I do not know whether I have grasped the doctrines of equity correctly in this matter, but if I have they seem to be like a good many other doctrines of Courts of Equity, the result of a disregard of general principles and general rules in order to do justice more or less fanciful in certain particular cases." *Greaves v. Tofield*, 14 Ch. D. at p. 578.

When this appellant was allowed to amend, the order was not confined to allowing him to set up the Registry Act, but extended to any other defence that he might be advised to make, and one cannot avoid a feeling of surprise that he had not put the plaintiffs to proof of the alleged promise or contested its validity as a binding agreement, but as that course has not been taken we have to consider the one question to which I have referred, viz: whether Burke and those through whom he claimed had actual notice of the claim which the plaintiff now alleges.

In England, even when constructive notice was held to

be sufficient, it is said that the proof must be extremely clear, and that suspicion of notice though a strong one is not sufficient; and in *Jolland v. Stainbridge*, 3 Ves. 468, it was said it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed and knowing that registered in order to defeat them of that title he knew at the time. And in *Wyatt v. Barwell*, 19 Ves. 440, Sir William Grant states the doctrine of the Court to have been this: "That it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance, that the Court will interfere."

It is of course necessary for the plaintiff to establish not only that Burke had notice before he purchased and registered his deed, but that Rose and McKenzie had also notice; as if he bought, even with notice, from persons who purchased without he may shelter himself under the first purchaser.

I shall presently point out that the evidence of most of the witnesses is insufficient to fix Burke with notice for reasons which I shall specify, and because they are open to the objections above stated by Lord Kingsdown in a judgment of the Privy Council, which is binding upon our Courts, and that the case will have to be considered upon the evidence of the Peterkins, coupled with the admission proved as to taking advice upon the title from the two professional gentlemen named.

Dealing then first with the evidence as it affects Burke We have Robert Dunlop, who narrates a conversation with James McFarlane, to the effect that if James Peterkin ever made up the money he had paid on the land he would give it up to him while he was living.

He says that *last year* or the *year before* I told him what McFarlane had told me. He did not say he had heard this before.

This conversation then seems to have occurred long subsequently to Burke's purchase, and after the commence-

ment of the suit. It gave no notice of any claim on the part of the plaintiff, but merely an expressed intention on the part of McFarlane to give it back to James if he paid the money during his life ; not even a promise is spoken of.

Eliza Stuart, who admits that she took no interest in the matter, refers to a conversation she heard between Burke and her husband ; she does not know when, but she says she then told Burke that Mrs. Peterkin had an interest in the land. She never spoke of the matter to any one, to her knowledge, and when applied to by Mrs. Peterkin informed her that she knew nothing about it, which, I am inclined to think, is the most reliable portion of her evidence.

The husband of the last witness refers to the conversation in this way : He is asked :—Q. What was said to him about it ? A. Oh, there wasn't much said ; she, just as a neighbour and well-wisher, advised him to have nothing to do with it ; that he could not get a good title to it unless Mrs. Peterkin would assent to it. Q. You heard her say this ? A. Yes. And in reply Burke applied an epithet to Mrs. Peterkin which the witness is too delicate to repeat in Court, or even to commit to writing for the private information of the learned Judge ; and he is unable to specify any date for the conversation ; it may have been during the time Rose and McKenzie were in possession, or previously."

Seth Turner says that he thought it was James Peterkin had a claim upon the land, and that when he mentioned to Burke that the Peterkins had a claim he referred to James, and this was after the sale to Rose and McKenzie, and after they had been cutting the whole of the winter.

He was not examined at the first trial, and after the lapse of nine or ten years was then asked by Peterkin if he knew anything about it, accompanied by the further question, "did you tell Burke," to which he replied, "Yes, of course, I told him," but is unable to fix a date. But the notice of a claim of James Peterkin can be no notice of a claim by Sarah Peterkin, even if loose conversations of this nature could satisfy the terms of a statute which requires actual notice.

George Kime is the only other new witness who speaks of a conversation with Burke about five years before, on cross-examination he says it might be six. He says he was a stranger in the country at the time, and it is only necessary to look at the leading character of the questions to see how very little reliance is to be placed upon this evidence, and how little, even with the aid of the suggestions, it amounts to :—

Q. What did he say Mr. Atkinson advised him? A. Well, I think to the best of my recollection he advised him not to buy the land. Q. Did he tell you why? A. No, he did not, not to my memory. Q. Did he say he took other advice? A. Yes, Mr. Scane's. Q. What about that? A. He told him he was perfectly safe in buying the land. Q. Did he say why he took Mr. Scane's advice and not Mr. Atkinson's? A. I think to the best of my memory it was because he thought he knew more, that his advice was better, better than the former advice.

It was then suggested by Counsel :—

Q. That his advice suited him better than Mr. Atkinson's? A. Well, something to that effect ; it did not concern me and I did not commit it to memory, but I know Mr. Scane advised him to buy the land, and said that the title was perfectly good. Q. And you are quite clear that he told you that Mr. Atkinson advised him not to buy the land?

Mr. Moss objected.

Mr. Boyd—Will you tell what Mr. Atkinson told him? A. I understood he advised him not to buy the land, for what reason I do not know, and I do not remember that he gave the reasons.

His Lordship—It might be for several reasons, that the land was not worth the money, for instance.

Mr. Boyd—Was anything said about any one having a claim ; did he tell you why he went to get a lawyer's advice? A. I cannot recollect anything that passed. Q. Was anything said at that time about the claim of any person ; whose claim was mentioned when this talk came up about getting advice? A. Well, if that was the only conversation Mr. Hardy was present, it was them that was carrying on the conversation ; I was a stranger in the country at that time. Q. What was said then? A. I think this Hardy referred to the Peterkins getting money, and providing they got that money that they would make it warm for him ; that was when the conversation was brought up this way, and that was what brought this conversation in connection with the advice. Q. Then he spoke of giving the advice? A. Yes. Q. Hardy said Peterkins would make it warm for them if they got the money? A. Yes, to the best of my recollection. Q. Then Burke said he had got this advice? A. Yes.

A witness named Hardy, who had taken a good deal of interest in getting up the evidence, was examined at both trials. On the first occasion he said nothing in reference to Burke, but at the second hearing he gives evidence of alleged conversations with Burke since his purchase of the land and before the first trial, in which Burke is said to have admitted that he had consulted Mr. Atkinson, who had advised him not to buy it, for if the Peterkins enforced their claims they would be very apt to take it from him, and that he had also advised with Mr. Scane, who had told him he would be safe in purchasing.

I am not now dealing with the credibility of the witnesses, but it is open to remark that this witness was examined on the former trial and then made no allusion to his conversation with Burke, and from the manner in which he expressed himself it is difficult to say whether the witness was stating his own opinion or that of Mr. Atkinson, and, like the former witness, he is not positive, and we have no information of the facts on which Mr. Atkinson advised.

This, it seems to me, would be dangerous evidence on which to defeat a registered title. If it points to any claim it is one on the part of James Peterkin, to whom McFarlane referred as being the party entitled to get the land back if he repaid the money within a certain time. But it is said that this admission of his having taken advice shews that he still had present to his mind the claim that Mrs. Peterkin had asserted.

What then had she asserted? It would seem that according to her own statement she sent to Burke to ascertain if he would agree to purchase one-half of the land, which she alleges McFarlane had agreed to sell, although he afterwards declined to carry it out. This was in the spring of 1871.

Now, although it is admitted upon these pleadings that the deed, though absolute in form, was intended as a security simply, what we have to consider is whether this appellant had actual notice of that circumstance, and have

a right in order to come to a correct conclusion upon that question, to refer to what the parties themselves say the transaction was.

Referring then to the evidence of James Peterkin, who may, I think, fairly be regarded as the real plaintiff, let us see what he says about it. Although he says that he was authorized to borrow, no application was made to McFarlane for a loan. He says nothing was said about interest or the length of time the loan was to run, or about a mortgage; and then McFarlane never entertained the application for a loan, but in the witness' own words said "I will give you \$500 for the land and my lifetime to redeem it;" and he further on explains it in these words, "McFarlane offered \$500 for 100 acres of land—that is, he would buy 100 acres of land for \$500."

That is his own version of the transaction, and this, it seems to me, is borne out and confirmed both by the conduct of the parties and by the evidence of several of the plaintiff's witnesses, who prove conversations with McFarlane.

Owens speaks of a conversation with him, in which he said "he had bought the land from James Peterkin, and that he had promised to allow him to buy it back again."

If this was really the transaction it was a sale with a verbal promise to allow the vendor to re-purchase within a limited time; a promise which could not be enforced in any Court, and for the performance of which Peterkin knew that he had to rely entirely upon the good faith of McFarlane, and Catharine Peterkin says that James Peterkin mentioned the terms of the bargain to her.

What information then was given to Burke inconsistent with this version of the transaction? Not a syllable is said to him that it was a mortgage, but he was told that McFarlane had a deed of the lot, with a promise that James or Mrs. Peterkin should have the right to redeem or repurchase during his lifetime.

Burke called upon the plaintiff at her own or James Peterkin's request. McFarlane, who had apparently

agreed at one time to sell half of the land, had changed his mind and refused to sell one half, and she then narrates what occurred thus "He then asked me who deeded the land to McFarlane, and I told him I did; and he asked me what kind of a deed I gave him, and I told him a clear deed; and Burke said he thought if McFarlane got a clear deed he could give a clear deed; and I told him he might give a clear deed but not a good title; and I told him on account of the claim against it that I was given McFarlane's lifetime to redeem it."

And again when she speaks of the conversation with Burke everything is consistent with its being a mere right to repurchase and inconsistent with its being to his knowledge a mortgage. When he spoke of its being a mean thing for McKenzie to do, and also when he spoke of his not being willing to buy the land because he was afraid he would have no luck with it, he used expressions all tending to shew that he did not like to interfere in the purchase without her concurrence, but recognising McFarlane's absolute right to deal with it as owner.

So far as Burke is concerned nothing further occurs between him and the plaintiff, but he subsequently purchased from Rose and McKenzie, who had been with the plaintiff's knowledge in possession, and had cut the most valuable timber upon it.

Burke appears to have consulted two professional gentlemen before he purchased, and it is said that he was warned by one of them not to purchase. This can only be important as shewing that he still had present to his mind the claim made by the plaintiff, which, as I have already shewn, did not affect his conscience with knowledge of the transaction being a mortgage.

I must confess that I was not surprised to find that one of the gentlemen he consulted advised that he could safely purchase.

All that Burke had actual notice of was that the plaintiff had a verbal promise to be allowed to repurchase within McFarlane's lifetime; that he had broken that promise; and that she, with the knowledge of the convey-

ance to Rose and McKenzie, and that they were cutting the timber, had not attempted to interfere.

He was not called upon, as a purchaser from a person appearing as the registered owner, to make further inquiries as to the nature of the plaintiff's claim; all that she had herself disclosed was not that she and McFarlane occupied the relative positions of mortgagor and mortgagee, but that she had a promise to redeem, and it would in my humble judgment be going very far in the way of rendering registration useless and titles uncertain, were we to hold on this evidence, assuming it all to be true, that Burke was affected with notice of the claim now asserted.

I say nothing of the express denial of Burke, and of the fact, which is always and I think very properly looked at in defence of a purchase without notice, that he gave the extreme value of the land: *Senhouse v. Erle*, Amb. 285.

It would be pushing a harsh rule to its extreme limit to hold Burke liable upon this notice. If the plaintiff by her own carelessness has put it in the power of McFarlane to do a wrong, and if she has encouraged the appellant to pay his money by taking no steps to prevent the cutting of the wood and asserting her right during the many months that elapsed before his purchase, she should be left, I think to her remedy against the actual wrong-doer.

I do not think it necessary, to go through the evidence as it affects McKenzie, as the plaintiff's husband does in one part of his evidence state that McFarlane had only a mortgage or a deed instead of a mortgage, if information from him could be regarded as equivalent to notice from the owner, and the learned Judge preferred his evidence to that of the defendant.

But the evidence of the plaintiff and James Peterkin both lead me to believe that the idea of setting up the transaction as a mortgage was an afterthought. She says she went to McFarlane about a week before he sold, not to remonstrate with him about breaking his agreement, but to see if he would return the land, and that after several attempts to find a purchaser she went to McFarlane to see if he would not let us have the place."

I think actual notice of its being a mortgage is not brought home to Burke, and that the appeal should be allowed and the decree reversed, with costs.

PATTERSON, J. A.—The bill in this case was filed in November, 1873, against McFarlane, to whom the plaintiff alleged she had conveyed the land in question as security only for an advance of \$500, and on McFarlane's verbal promise to reconvey to her in case during his life-time she repaid the money; against Rose and McKenzie to whom McFarlane had conveyed; and against Burke, who had bought from Rose and McKenzie. McFarlane died before answering, and his administrator was added as a party.

A decree was made on the 18th October, 1876, by which it was declared that the conveyance to McFarlane was by way of security only; and that Rose and McKenzie purchased from McFarlane with actual notice of the plaintiff's right to redeem. An injunction was granted to restrain Burke and his servants, workmen and agents from committing waste, and it was referred to the Master to take accounts, with a direction (amongst others) that the defendants, on payment of what might be found due by the plaintiff, should assign and convey the lands to the plaintiff free and clear of all incumbrances done by them or any of them.

From that decree Thomas Burke appealed to this Court.

Various proceedings and delays had prevented the entering the decree until 27th February, 1878. In the meantime John Burke had, by an order made on 23rd January, 1878, been added as a party defendant, and an injunction had been issued restraining him, as well as Thomas, from committing waste until further order; but John was not alluded to in the decree, which was settled and entered bearing the date 18th October, 1876, on which day judgment had been pronounced.

The appeal was by Thomas Burke only.

We allowed the appeal and gave leave to Thomas Burke to file a supplemental answer setting up the defence of the

Registry Laws, or such other defence as he might be advised, and gave the plaintiff liberty to proceed to a second hearing in the Court below.

In his first answer Thomas Burke had admitted the allegations of the plaintiff respecting the nature of her dealings with McFarlane, and had relied upon his having purchased from Rose and McKenzie for value and without notice of any claim by the plaintiff; and he also denied any knowledge of Rose and McKenzie having had notice of the plaintiff's claim, either before they purchased from McFarlane or while they owned the land. By his supplemental answer he claimed the protection of the Registry Act, setting out that he had purchased for value, paying part of the purchase money and giving a mortgage for the balance to Rose and McKenzie, who had assigned it to one Watson, to whom the legal estate had passed, and that he bought without notice.

John Burke also filed an answer to the bill on the same day with the supplemental answer of Thomas, denying the allegations in the bill which Thomas's answer had admitted, and claiming the benefit of the other defences pleaded by Thomas.

The position of John is not intelligible on the materials before us. There is no allegation respecting him or his connection with the land in the pleadings or in anything else, beyond the copy of the order which makes him a party and awards an interim injunction against him.

It was quite correct to say what appears to have been said in the Court below, that this Court gave him no leave to answer, for this Court knew nothing of him. What right he may have had to defend himself, or whether there was anything to defend himself against when he was made a party, are matters foreign to our knowledge of the action.

At the second hearing, at which Thomas only is stated in the decree to have been represented, some further evidence, in addition to that which had been given at the first hearing, was adduced, and the decree was made, from which the defendants Rose, McKenzie, Thomas Burke, and John

Burke appeal. It declares that Thomas Burke, when he purchased the lands, "had notice and knowledge of the plaintiff's claim to and right of redemption of the said lands and premises, and that he is not a *bona fide* purchaser thereof for value without notice."

The first ground of appeal is, that the Chancellor at the trial ought to have ruled that upon the answer of John Burke the whole case was open, and that the plaintiff should have established by evidence the alleged right of redemption.

I believe no point of this sort was attempted to be made on the argument of the appeal, perhaps because the fact was, as put in the reasons against the appeal, that no issue had been joined with John.

I do not see in what way we can take any notice of John on these proceedings. Assuming the case to have been all open on his answer, it would only be so as against him, and we do not know on what ground relief is sought against him.

The complaint which the other appellants make is upon questions of fact and a question of law.

The deeds conveying the land were all promptly registered; that from the plaintiff to McFarlane in 1866; that from McFarlane to Rose and McKenzie in 1871; and that from Rose and McKenzie to Burke in 1872. They were all for valuable consideration. Burke contends that under the effect of the Registry Act his conveyance must prevail against the equity asserted by the plaintiff.

He submits that the fact stated in the decree that he purchased with notice of the plaintiff's claim is not supported by the evidence; and that the further essential facts found by the learned Chancellor in his judgment as reported to us, but not stated in the decree, namely, that the notice to Burke was actual notice, and that Rose and McKenzie also took with actual notice, are not supported by sufficient evidence.

The former decree found notice to Rose and McKenzie, but as far as Burke was concerned that decree was vacated.

prevent the Court from decreeing the rectification of the deed which by mistake had failed to cover all the land intended to be conveyed. The doctrine of the Court, that notice of a prior equity was equivalent to registration, and that consequently in such a case priority of registration was of no avail, was held to be still in force.

Then came the Act of 1865. The 62nd section repeated the enactment of all former statutes, that unless an instrument affecting lands were registered it should be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration who registered the instrument under which he claimed. Section 64 declared that the registry of any instrument under that or any former Act should in equity constitute notice of such instrument to all persons claiming any interest *in such lands* (which probably was intended to denote the lands affected by the instrument), subsequent to such registry. Section 65 enacted that priority of registration shall in all cases prevail, unless before such prior registration there should have been actual notice of the prior instrument by the party claiming under the prior registration.

Section 64, except in its loose reference to *such lands*, followed a clause in this Act of 1865, and so also did section 66, the effect of which we have more immediately to consider. It declared that "No equitable lien, charge or interest affecting land shall be deemed valid in any Court in this province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this Act." The language of this section requires something more than its own force to enable us to ascertain its meaning. "The same party"—no party having been named before—is a rather elliptical expression, like the words "such lands" used by the same draftsman in section 64. I do not doubt that we may properly take it to refer to any party against whom the equity is asserted.

What are we to understand to be the "equitable lien,

charge or interest" dealt with? Are equitable interests intended which are created by instruments in writing, or only those not so created? In my opinion the section refers to the latter class only.

The words are undoubtedly general enough to cover all equitable interests in land; but we find express provision in section 34 for registering instruments which affect lands in equity as well as those which affect them at law. All the provisions which regulate priority between registered and unregistered instruments apply to those by which only equitable charges are created. Thus under section 65 actual notice of an unregistered instrument creating an equitable charge is required to prevent its being postponed to a registered instrument subsequently executed by the same person. This Act for the first time extended the description of instruments that might be registered so as to include those of every conceivable character which were capable of affecting lands.

The former Registry Acts, while they admitted to registration instruments which affected lands either at law or in equity, extended that privilege to those instruments only which could be described as deeds, conveyances, wills, or devises: See 9 Vict., c. 34, s. 6; 13 & 14 Vict., c. 63, s. 3. I say nothing of the registration of judgments, which was merely an interlude in our legislation.

An equitable mortgage by deposit of title deeds was an interest in land which was incapable of registration, and even where there was a memorandum of deposit containing an agreement to execute a mortgage, that writing, not being a deed or conveyance, could not be registered. For this reason it was held by the present Chief Justice of Ontario when Vice-Chancellor, in *Harrison v. Armour*, 11 Gr. 303, that the registry law did not apply to the equitable mortgage which in that case had been created by deposit of deeds accompanied by a memorandum, and that the mortgage therefore retained priority over a registered judgment. This decision was in accordance with the statute 13 & 14 Vict., c. 34, which gave effect to the registration of judg.

ments, but added in section 3, "Provided always that nothing herein contained shall be construed to affect the rights of equitable mortgagees as now recognized in the Court of Chancery in this province."

The judgment was pronounced on 18th April, 1865, and his Lordship called attention to the position of the law by saying at the close of his remarks: "With regard to the state of the law in respect of instruments incapable of registration, but which create equities to which the Court is bound to give effect, it is a question for the Legislature."

I have no means of knowing how far the action of the Legislature may have been influenced by this judgment, but we find the subject dealt with in the Act which received the Royal assent on the 18th of September following its delivery, by extending the right of registration to all kinds of instruments, by dropping the proviso respecting equitable mortgages, and by enacting sections 65 and 66.

Having regard to the considerations to which I have adverted, amongst which are the indications from the elliptical character of the composition that we ought not to apply a very rigid criticism to the language of the enactment, I am satisfied that no interests are intended to be described in section 66, except equities not created by any written instrument. The class aimed at may, I think, be pretty fully detailed by adopting from the judgment of Blake C., in *McMaster v. Phipps*, his enumeration of the equitable rights with reference to which he was testing the effect of the Act 13 & 14 Vict.

He spoke (at page 258 of the Report) of equitable rights which had not been created by deeds, conveyances, or written instruments of any sort, but which arose by parol agreement, or grew out of the conduct of the parties, parol contracts partly performed, resulting trusts where land has been purchased with the money of one and the conveyance taken in the name of another, and the large class where deeds are set aside by the Court for fraud or for undue influence, or upon grounds of public policy as between guardian and ward or attorney and client.

Those are the interests which, as I interpret section 66, are to be deemed invalid as against a registered instrument executed by the party against whom they may be asserted. The question is, whether this provision is to prevail in favor of a person who, when he takes the instrument, has actual notice of the equity.

This is the question considered by Mowat, V. C., in *Forrester v. Campbell*, 17 Gr. 379, where he decided that notice of the equity prevailed against the literal terms of the section. The same point was decided by Strong, V. C., in *Wigle v. Settrington*, 19 Gr. 512, the learned Vice-Chancellor expressing his entire concurrence with the views of Mowat, V. C.

I have endeavoured to form an independent judgment upon the question by a careful examination of the statute, and the result is that, while I am sensible that there may be reasons of policy why the registration of a title ought to afford security to a purchaser against claims depending merely upon parol evidence, I am not prepared to over-rule the judgments which have held that it has not been so declared by this statute.

It is true, as put by Mowat, V.C., that the terms of section 66 are no more absolute than those of the old statutes which declared the effect of registering or omitting to register, and which were held not to give priority to one who took with notice of the previous deed.

But that doctrine, which modified the effect of registry when registry was at most only notice of the existence of the previous deed, without giving information of its contents or even of its nature or effect, might perhaps have been held inapplicable to this statute, which made a change in the mode as well as in the purpose of registration, requiring the whole instrument to be exhibited and extending to every kind of instrument; and which, moreover, by making express reference to actual notice, rather discredited the assumption that the doctrines long held under the former laws were applicable to the new system in the absence of express enactment.

The maxim *expressio unius est exclusio alterius* might be held to govern the construction of section 66, particularly in view of the important change of policy evidenced by the introduction of the new system of registration, but it is impossible to feel certain that the application of the rule to a statute so loosely framed as this one would be a safe test of the meaning of the Legislature.

To make section 65 consistent with section 62 we have to make liberal allowance for what I have called the elliptical character of the composition, as shewn in sections 64 and 66. In its terms it gives effect to priority of registration, where there is not actual notice of the prior instrument, without alluding to the requisite of valuable consideration; and it says that priority of registration shall prevail without explaining what its consequences shall be. The section must apparently be read with reference to section 62, and as introducing an exception, in the case of actual notice, to the general effect declared by that section, of registering or omitting to register. This is however, supplying by construction what the draftsman has not expressed, and the construction thus assumed may not after all hit what may have been in the mind of the Legislature. A doubt of its correctness is suggested by the fact that in 1873 the Legislature, after having once, in 1868, re-enacted the law in the precise terms of the Act of 1865, and notwithstanding the assertion in *Forrester v. Campbell* and other cases that the rule of the Court concerning notice applied to prevent injustice being done by section 62, and notwithstanding the existence of section 65, thought it necessary to import into section 62 the words "without actual notice," as we now find them in section 74 of R. S. O., c. 111. It was not said to what this actual notice was to relate, but the words were introduced at all events, and one does not see the use for them if section 65 had the same effect.

On the whole, it would be in my judgment unsafe to deduce from the occurrence of the exception in one section of this very loosely worded piece of legislation and its absence

from another, anything equivalent to a legislative declaration that actual notice should only interfere with the effect of registration in the case expressly provided for.

There is another consideration which is noticed by Mowat, V. C., and which has force both as an illustration of the looseness which I speak of and as affecting the application of the rule *expressio unius, &c.*, if otherwise appropriate. It is that under the literal reading of section 65 actual notice at *any time before registration* operates to defeat the priority of the subsequent instrument even though the purchase may have been for value and without notice.

If this was not intended, we have a striking instance of looseness. If it was intended, then it is only that full effect to which the rule of construction would apply, and it would not stand in the way of holding that one who *purchased with knowledge* of an equitable title could not avail himself of the registry law to defeat it.

It is easy to put a case in which the injustice of the construction which excludes the effect of notice would be glaring. Take for example the case of a resulting trust, where A. to the knowledge of C. has bought land with B.'s money and has taken the conveyance in his own name. It would be manifestly unjust to permit C. to obtain title as against B by purchasing from, A and registering his deed.

The protection required would seem to be rather against the establishment of alleged equitable titles and of asserted notice of them by merely verbal testimony, which may belong to another branch of legislation than a registry law, although some measure of such protection might possibly be provided in connection with registration, as for instance by enabling a person who asserts a title of which he has no written registrable evidence, to record a declaration made by himself, as a *lis pendens* is now recorded.

An argument against the recognition of actual notice as an answer to registration, under section 66, is removed if we find scope for the operation of the clause without conceding its absolute effect.

this we may do by bearing in mind the class of interests which formed the subject of the adjudication in *Harrison v. Armour*, 11 Gr. 303, to which I have already referred, namely, those incapable of registration under the old law, and many of which, not being evidenced by any writing, are incapable of registration under the present law.

To such interests it is held the registry law did not apply. Section 66 brings them under the law and postpones them to registered instruments executed by the person against whom they may be asserted. There is no reason of policy which requires them to receive harsher treatment than interests evidenced by writing, unless, as I have suggested, in the matter of evidence, which is not what we are dealing with.

Holding, therefore, as was intimated in some of the judgments delivered when the case was first before this Court (4 A. R. 25) that the defence made by Burke under the Registry Law which we allowed him to plead, was liable to be answered by proof of express notice of the plaintiff's title when he purchased the land, coupled with such notice to Rose and McKenzie as to prevent their being said to have a title under which Burke could shelter himself, we cannot disturb the judgment without holding that the learned Chancellor was wrong in finding as facts that Rose and McKenzie, and also the defendant Thomas Burke, had actual notice.

I cannot say the finding that Burke bought with actual notice that the plaintiff asserted an interest in the land was not supported by evidence, and I do not consider myself in a position to form a judgment of the comparative or absolute credibility of the witnesses which it would be proper to oppose to the estimate formed of their evidence by the Judge before whom it was given.

I was of opinion when the case was before this Court after the first trial, that whatever evidence there was of notice to Burke in the early stages of the history, there was good ground for doubting the propriety of holding that after all that had occurred shewing acquiescence by

the plaintiff in McFarlane's assertion of ownership, and in his sale to Rose and McKenzie, notice *at the time of his purchase* could fairly be attributed to Burke. That position was attacked at the last trial by the production of further evidence, and chiefly by two witnesses, who swore to Burke's statements that before purchasing he had taken the opinion of counsel as to his safety in purchasing in the face of the plaintiff's claim.

This evidence was not met by any denial by Burke or by either of the legal gentlemen who were said to have been consulted; and it was undoubtedly direct evidence that the fact that the plaintiff was asserting some right in the land was present to the mind of Burke when he purchased.

The only question fairly open is, whether the claim of which Burke had notice was that which he has admitted, or any other which has been proved.

The admission, it will be borne in mind, was that the arrangement between the plaintiff and McFarlane was of the character alleged in the plaintiff's bill, but it was coupled with the assertion that he did not know of that or any other claim of the plaintiff to the land until after his purchase.

The plaintiff undertakes to prove that he had notice of the claim she sets up.

If nothing more had been shewn in evidence than that Burke knew that a claim was asserted by the plaintiff, we should, almost as of course, connect that notice with the claim admitted on the pleadings.

But something more has been shewn. The plaintiff has given evidence, perhaps unnecessarily, of the dealings between her and McFarlane. The transaction had been conducted entirely by James Peterkin, who says he acted as agent for the plaintiff, but who probably had a personal interest in the property and in the bargain; and whatever the plaintiff knew of the actual bargain she learned from James. It is fair to conclude that when either the plaintiff or James spoke to Burke or to any one else of the plain-

tiff's rights, they spoke of the rights which, under that arrangement, the plaintiff had or thought she had.

Those were the only rights of which Burke had notice. If they differed from the rights he may have admitted, it must follow that the plaintiff fails on the issue raised upon the allegation of his purchase with notice.

Notice of rights of a different kind would of course also bind him, and if it became necessary an amendment charging it should be allowed; but such other rights must be proved. There is no admission to aid as to them.

On this topic I confess I have latterly had a great deal of hesitation. I say latterly, because it was not until after the argument of this appeal and after conference with other members of the Court that I came to apprehend the force of the considerations involved in it. It was not made a point in argument before us nor, so far as I can perceive, before the Chancellor at the trial. His Lordship expressly states in his judgment that he did not at the last any more than at the former hearing consider the question open whether or not the dealing between the plaintiff and McFarlane was a security for the repayment of an advance of money, because the fact was distinctly admitted by the answers; and he mentions that while evidence was given of the fact, it was, on all but one occasion, given incidentally in connection with evidence of notice. I do not read the notes as quite bearing out this last statement, as I shall have occasion to notice again, but though the character of the dealing may only have been spoken of in connection with the notice to Burke or McKenzie, the evidence so given may be none the less important, if it goes to prove what it was of which notice was given.

James Peterkin's evidence respecting the arrangement with McFarlane was given at the first trial. I believe the whole of it is contained in the extracts which I shall read:

"I am brother-in-law of the plaintiff. I saw McFarlane about land in question when Mrs. Peterkin owned it. She sent me to Thompson, son-in-law of McFarlane, asking him to advance money on a mortgage on the property. I saw

McFarlane about the land. He came to me out of the house to the shop, and said he would give \$500 on the lot and his lifetime to redeem it. I staid at McFarlane's house all night, and he next morning made me the offer of advancing \$500 on the place in the morning, with his lifetime to redeem it. I then went out to Mrs. Peterkin with a deed which was signed the next day. I told her of the arrangement, and she was agreeable."

On cross-examination he is reported to have said, amongst other things:—"McFarlane said at the time the bargain was made that all he wanted was his money back at any time during his life. I did not make any application to him for money that I remember, but he came along to the shop door, Mr. Thompson being near enough to hear, when McFarlane said: 'I will give you \$500 for the land and my lifetime to redeem it.' I accepted the offer and said that I would take the money. I did not suggest a mortgage to McFarlane. He offered \$500 for 100 acres of land, that is, that he would buy 100 acres of land for \$500. He was to go into possession of the land until it was redeemed. There was no provision made that McFarlane was not to cut timber at that time or at any other time. He did not say what he was going to do with it. At the time of the bargain there was no bargain about who was to pay the taxes. I don't know McFarlane's age. I think he was about 70 when he died. I did not ask for any writing; nor did I suggest a mortgage nor anything about interest; The deed was prepared in Brooks and Campbell's office. I don't remember what amount of interest I offered Thompson. I cannot tell whether I expected to get money at 6 per cent. in 1866. I will not swear that I expected to get money at less than 10 per cent. in 1866. When I saw Mrs. Peterkin after the interview with McFarlane I told her that McFarlane had given \$500 on the lands, and she was satisfied that McFarlane gave \$500 and his lifetime to redeem it. She did not ask what the rate of interest was to be. She did not ask who was to have possession of the place, nor who was to pay taxes, as I recollect. She did not go to see McFarlane. She and her husband went with me and signed the deed. I was present when the deed was made. I took the deed to McFarlane and got the money. He paid it to me himself. I did not speak to McFarlane again about the place for four or five years. * * * McFarlane told me to watch the lot and not let any timber be cut. I promised to watch the lot."

I should not gather from reading the notes that the plaintiff only gave evidence of the original bargain incidentally, because several witnesses appear to have been called for no other purpose than to prove statements made by McFarlane.

These witnesses were Owens, Urquhart, Hardy, and Walker. Dunlop was called for the same purpose, but he also spoke of having talked to Burke about the land.

In this evidence we have James Peterkin stating the transaction in direct terms as an offer from McFarlane of \$500 for the land; Peterkin's acceptance of that offer; the offer being to buy 100 acres of land for \$500, McFarlane to go into possession till it was redeemed; no suggestion of a mortgage; nothing said of interest or taxes; but a promise given to allow it to be redeemed at any time during McFarlane's life—and we have nothing in what any witness proves McFarlane to have said that is not consistent with the transaction being a purchase by him with a verbal promise to allow the plaintiff or James Peterkin to redeem or repurchase.

I find nothing to suggest that the plaintiff, or James Peterkin who acted in her name, ever supposed that a debt had been created or that McFarlane could have sustained any proceeding against the plaintiff as his debtor for the \$500. The promise, as it seems to have been stated, was unilateral.

While this appears to be the effect of the evidence of the contract, the notice given to Burke, as told by the plaintiff or by James, was of the same purport, the formula usually being that McFarlane had got a deed for the place and had given his lifetime to redeem it.

One of the tests whether the transaction was a sale with a contract for repurchase, or a mortgage under the form of a sale, put by Lord Cottenham in *Williams v. Owen*, 5 M. & C. 303, is this:—"If the transaction was a mortgage there must have been a debt, but how could Owen have compelled payment?" In one of the older cases, *Cotterill v. Purchase*, Cas temp. Talbot 61, a deed was held to be

absolute notwithstanding a covenant contained in it by the grantor, a tenant in common, not to agree to a partition.

Thus the grounds appear to be very strong for holding that the notice to Burke was not notice of the claim admitted on the record, but notice of one of a different character as to which he was bound by no admission, but was at liberty, even if it had been pleaded by an amendment of the bill, to object that McFarlane was never bound by it for want of a writing under the Statute of Frauds, or such part performance or possession as would enable the Court to dispense with a writing.

Now here arises my difficulty. I do not find that a view such as I have been putting was presented in the Court below, and I have reason to believe it was not presented, as it has not been made a point of in the argument on either appeal. It certainly did not occur to me until, as I have mentioned, it was suggested in conference after the last argument. If it had been put forward and sustained on the first appeal I am not prepared to say that it could at that time have led to a dismissal of the bill, because of the question relating to the status of Burke as a purchaser for value, his purchase money not being fully paid, except for the purpose of the Registry Law, which at that time had not been pleaded. If sustained now, it negatives the notice relied on upon the pleadings, and therefore technically his registration should protect him. But to sustain it now we have to decide an issue of fact not presented to the Court below, that is, one to which the attention of the Court was not directed, and which, had it been insisted on, might have led to further evidence being given, or to views of the evidence being brought out by a discussion of it when the matter was fresh, by counsel familiar with all the details of the trial, before the Judge who presided and who heard and saw the witnesses, and possibly with reference to facts and incidents which are occasionally understood and tacitly conceded by those engaged at a trial, but which are not put down in the evidence as spoken and reported.

The point which was made, that the claim of which notice was given was a claim of James Peterkin and not of the plaintiff, is strongly supported by parts of the evidence, though it is not made out beyond dispute; but I do not think it makes any substantial difference how that was, because the right spoken of was the same, whether called that of James, who was always the actor and is probably the real plaintiff, or that of Catherine.

The inclination of my opinion is very much in favour of the conclusion, as a matter of fact, that the transaction arranged between James Peterkin and McFarlane was a sale to the latter, with a promise from him to re-sell for the amount he was paying, but that promise being verbal only and not, so far as shewn, binding in law; and that the plaintiff's supposed right to re-purchase was the only title of which Burke had notice. I have no means of forming, and it is not my province to form, a judgment as to Burke's honesty or greed in desiring to secure the land when he knew that the plaintiff still clung to the promise which McFarlane had repudiated. Having regard to the fact that Burke was buying from Rose and McKenzie, to whom McFarlane had already sold, it may be that any reflections on his conduct may be unjust to him. But dealing only with his legal rights, which are all that concern us, I cannot say that I am satisfied he bought with notice of any equity of the plaintiff. It is only from the technical effect of the pleading that we can say the plaintiff had an equity of redemption as between her and McFarlane. We may not be at liberty to assume that Burke had not satisfied himself of the truth of the plaintiff's allegations before he admitted them: but that does not require us to ignore the evidence of James Peterkin, who says the facts were different. The question is, how far are we at liberty and how far would it be proper for us to decide the question of fact.

To repeat the matter in another form:—The judgment in review proceeds, as I apprehend its effect, on these propositions: The defendant Burke bought with notice that the plaintiff had a redeemable interest in the land; he

admits in his answer that she had an equity of redemption; therefore he bought with notice of that equity.

The reply is, that the only notice he had was notice of such a claim as James Peterkin—from whom, directly or indirectly, the notice came—supposed the plaintiff had; and that that was not the equity set up by the bill, but one of a different kind, which is not admitted and is not proved.

My present opinion is, that I should find the question of fact, involved in this last proposition in favour of the defendant if I could see my way to hold that it is properly before us for decision. But I feel that under the circumstances we should be rather straining our powers, as well as doing what we have not been asked to do, if we assumed to dispose of the case on that question; and I fear that it would not be for the benefit of either of the parties that we should prolong this litigation by inviting further evidence, or even further argument.

While, therefore, I entertain grave doubts of the right of the plaintiff to recover, my conclusion is, that we should dismiss the appeal.

PROUDFOOT, J.—By an order of this Court of 10th March, 1879, the defendant Burke was permitted to file a supplemental answer setting up the defence of the Registry Laws, or such other defence as he might be advised.

The decree was opened no further than to permit Burke to take advantage of the new defences he might choose to set up. As to the other defendants the decree of 18th October, 1876, remained unimpeached, and by it the Court of Chancery declared that the defendants Rose and McKenzie purchased the lands from McFarlane with full knowledge and actual notice of the plaintiff's claim to the lands, and of her right to redeem the same.

I apprehend, therefore, that it is not open to Rose and McKenzie to appeal, and that this appeal must be considered as that of Burke alone.

By this supplemental answer Burke, after saying that the mortgage he gave to Rose and McKenzie had been

assigned by them to one Watson, proceeds thus: "I had no notice or knowledge of the plaintiff's alleged claim to the said lands, or any part thereof, and I became the purchaser thereof and paid the said moneys and gave the said mortgage in good faith, in reliance upon the title of the said lands as shewn by the records of the registry office, in which the title thereto appears as a registered title; and I submit and claim that under the circumstances herein stated I am a *bona fide* purchaser for value without notice, and I claim the benefit and protection of the registry laws and all other laws in favour of such purchasers in force in this Province."

It was contended on his behalf that it was competent for him to shew that Rose and McKenzie had no notice, and even if notice were proved to himself he might shelter himself under their ignorance.

I do not think he can. The only issue raised by the supplemental answer is his own want of notice, and upon that ground alone he claims the protection of the registry laws.

But further, the finding of the Court by the original decree that Rose and McKenzie had actual notice of the plaintiff's right when they purchased was not appealed from by them, and must therefore be considered *res judicata* as to all parties then before the Court, and Burke was one of them.

Had he intended to rely on the want of notice to Rose and McKenzie he should have set it up in his answer, and then I think it would have been struck out as going beyond the leave granted to him by this Court.

The learned Chancellor who heard the cause properly held that the only question before the Court as it affected Thomas Burke was that of notice under the supplemental answer, though he seems to have received further evidence as to notice to McKenzie.

No counsel appeared at the last hearing for the other defendants.

The further contention at that hearing, that the plaintiff was obliged to prove the right of redemption, was refused

by the Chancellor, and was so clearly untenable that it was not renewed before us.

The only question, therefore, which we have to decide is, whether the evidence at the hearings establishes actual notice to Thomas Burke.

Something was said during the argument as to the policy of allowing notice to impair a title apparently good on the register; that it was at variance with the habits of the people and their mode of dealing with landed property in this country; and that at least it ought to be confined to the case of active fraud. I find it difficult to conceive a clearer case of active fraud than that of a man who, knowing of another's title to land, buys in such a way as to get a title on the register and then sets the owner at defiance. And I should be sorry to impute to the dealers in land in this country such oblivion of the plainest principles of morality and fair dealing as not to know that such conduct was a violation of them. If they were so forgetful of honesty it would be the duty of the Court to impress it upon them by all the resources at its command. But it is not for us to make the law, and it has been too long the rule in the Court of Equity that disregard of notice is equivalent to fraud—a rule recognized by the Legislature (s. 80)—for us to venture to disregard it. The qualification imposed by the Legislature is only that a purchaser shall not be affected by constructive notice—a limitation that might reasonably enough be imposed—that the notice must be actual, such as to affect the conscience.

It was also argued that section 81 contains no provision that actual notice would protect an equitable lien. A critical examination of this section might also lead to the conclusion that an equitable lien, charge, or interest, though registered, would be of no avail. But it has been held in a number of cases that this section was not passed to cover fraud, and that the holder of a registered instrument could not shelter himself under the registry law, if he had notice of an unregistered equity. *Forrester v. Campbell*, 17 Gr. 379, *Wigle v. Setterington*, 19 Gr. 512, *Bell v. Walker*, 20 Gr. 558.

At the last hearing Burke was not examined on his own behalf, his counsel relying upon the evidence given by him at the former hearing.

There is no doubt a considerable conflict of testimony, and, according as the learned Judge believed or disbelieved the witnesses, there was ample evidence to support a decree for plaintiff or for defendant. With regard to the evidence at the former hearing the Chancellor says: "There was much in the evidence of Burke and McKenzie, especially in that of Burke, which I discredited. I thought him untruthful, and that the weight of evidence preponderated in favour of the plaintiff. I formed my judgment, of course, not only from the words uttered by the respective witnesses, but from their demeanor and the many circumstances which aid a Judge of fact, before whom evidence is given, to form a correct judgment as to its truthfulness, and the weight properly due to it."

It seems to me perfectly clear that no Court of Appeal ought to interfere with the finding of a Judge on a matter of fact, who based his conclusion on the credibility of the witnesses on the one side and the untruthfulness of those on the other side, unless indeed there were no evidence in support of the finding. We cannot determine whether the demeanor of the witnesses was such as to lead to the belief of their veracity or otherwise. Evidence taken by a phonographic reporter can give no means of determining that. In the case of a verdict found by a jury, no Court would ever interfere with it because they believed one set of witnesses and not another set. And at least as much effect should be given to the decision of a Judge who has spent many years of his life in weighing testimony and determining the proper value to be placed on it.

All that we can properly determine, therefore, is whether there was any evidence to support the decree. I shall only refer to a few passages to shew that there was evidence, which the Chancellor believed, of actual notice to Burke, bearing in mind that Burke's denial was not believed by the Chancellor, who thought him not to be trusted. The plaintiff swears that in the spring before McFarlane sold

the land she had a conversation with Burke, when, in answer to a question by Burke, she told him McFarlane "had got a clear deed, giving McFarlane's lifetime to redeem it, or as soon as the money was made up. Burke said he thought that if McFarlane had a clear deed that he could give a clear deed. I told him he could give a clear deed but not a good title." She repeated this on the second trial.

With regard to the evidence of the plaintiff it was said she required corroboration. But that, I think, is a misapprehension. She was not giving evidence of any contract with a deceased person. That McFarlane gave a right to redeem was admitted on the answers of all the defendants. What she is testifying to is notice to Burke, and if she is believed the decree might have been given on her evidence alone.

But her evidence does not stand alone. Before McFarlane sold James Peterkin told Burke that the plaintiff owned the property. He repeated this statement at the second hearing. Turner had some idea of buying the place and got advice from a lawyer not to buy, and advised Burke not to do so, as the Peterkins had a claim upon the place, when Burke said he would see about it. It was objected that Turner's notice was that James Peterkin had a claim on the place; but that is of little importance, for it is alleged in the bill and admitted in the answers that James Peterkin was the agent for the plaintiff in this transaction. And with regard to this class of evidence of notice given by persons who had no right or interest in the land, though they can scarcely be called vague rumours to which no importance should be attached, if of themselves insufficient to affect Burke with notice, they are amply sufficient to corroborate the evidence of the plaintiff.

The broad rule stated in *Sugden's V. & P. 755*, that notice must be given by a party interested in the property, and that flying reports are not notice—a rule adopted in *Barnhart v. Greenshields*, 5 Gr. 99, P. C.—must be taken in connection with the circumstances of the cases. In.

it was notice of that right. His counsel did not even argue that the transaction was a conditional sale, and that he had notice only of a conditional sale. Had any case of that kind been intended to be relied on it should have been set up in the pleadings, so that the plaintiff might have given evidence to disprove it. She has been entirely misled if effect be given to such a contention now, and it would be a gross injustice to her to defeat her by a defence of that kind being sprung upon her by the Court, and which the defendant, reckless as he seems to have been, did not venture to urge.

In *Stewart v. Horton*, 2 Gr. 45, the agreement between the principals was in writing and in terms a conditional sale, but which the Court thought was such that it ought to be considered a security only. Tweedy, a purchaser, claimed to have bought for value without notice. It was admitted by him that before purchasing he told the plaintiff of his intention to purchase, when the plaintiff warned him not to have anything to do with it, as it was his property; and this was determined by the Court to be sufficient notice of the plaintiff's right. That is, that the purchaser having notice that the plaintiff claimed it as his property, he was bound by what the Court should determine to be the plaintiff's right. So here, Burke buying with notice that the plaintiff claimed the property as hers, he is bound by that right, whatever it may be; and as he has admitted that she had a right to redeem, and all the others have done the same, he is bound to give effect to that right.

I have not thought it necessary to go over the evidence as to notice to McKenzie, but I think it as well proved as that to Burke if it were required to prove it.

There is contradictory evidence on all the matters arising, but I have only noted enough to shew that there was evidence to support the decree, and that being so, I consider we ought not to interfere with the conclusion the Chancellor arrived at.

The effect of the registry law upon equitable interests

in land, which either were not registered or were incapable of registration, has never, I think, come before a Court of Appeal, and the question may therefore be open for consideration.

In the Act of 1865, 29 Vict., ch. 24, every instrument affecting lands after the grant from the Crown, was to be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless the instrument was registered before that under which the subsequent purchaser or mortgagee claimed. (Sec. 62).

Numerous decisions of the highest authority in England and Ireland have determined that this was inapplicable to a deed taken with notice of an unregistered instrument. Any equitable interests therefore created by an instrument capable of registry were protected, notwithstanding that enactment, if the subsequent purchaser had notice.

The 65th section declared that priority of registration should in all cases prevail, unless before registry there should have been actual notice of the prior instrument by the party claiming under the prior registration. This enactment certainly did not mean to give effect to a prior registration of a voluntary deed. It could not have been intended to alter the requirements of the 62nd section, that to claim the benefit of the registry law the registered instrument must have been upon a valuable consideration. But in express language it protects instruments generally, and therefore, whether creating legal or equitable interests, of which the subsequent purchaser had notice—thus giving the same effect to notice that the decisions had given to it in regard to section 62.

By section 66, no equitable lien, charge, or interest shall be valid as against a registered instrument executed by the same party, his heirs or assigns. I cannot think that this section intended to give effect to a voluntary registered instrument in opposition to the provisions of section 62, though its language is wide enough to do that. But the whole of these sections must be read together. There is no indication in this section 66 that any distinction was intended be-

tween equitable interests capable of registration and those incapable of it. But it is declared generally that all shall be void against the registered deed. This is not consistent with the prior sections, which protect unregistered instruments capable of registration where there is notice.

These, therefore, must clearly be excluded from it, and the section places all equitable interests on the same footing; therefore the conclusion seems inevitable, that all, whether capable of registration or incapable of it, are equally protected where the purchaser for value takes with notice.

The foregoing is merely an abstract of the judgment of Mowat V. C., in *Forrester v. Campbell*, 17 Gr. 379, which seems to me to construe the Act correctly.

The Ontario Registry Law of 1868, 31 Vict., c. 20, repeated these clauses of the Canadian Act of 1865, in sections 64, 67, & 68.

The Ontario Act of 1868 was amended in 1873 (36 Vict. c. 17) and in section 64 the equivalent of section 62 of the Act of 1865, inserted the words "without actual notice," as the condition upon which purchasers for value might protect themselves against unregistered instruments, thus giving legislative sanction to the judicial interpretation of the clause in the prior Acts.

The R. S. O., c. 111, sections 74, 80, & 81, do not make any alteration of the law in this respect.

The decision of Mowat, V. C., in *Forrester v. Campbell*, was approved and followed by Strong, V. C., in *Wigle v. Settrington*, 19 Gr. 512, who says (p. 519) that he had some doubts how far the former rule as to notice would apply to a purchaser claiming under a registered deed, under section 68 of the Act of 1868, especially as the 67th section makes provision for the case of notice of a prior unregistered instrument, but says nothing as to an equity not depending on any written instrument. But he was glad to find that the point was very fully considered by Mowat, V. C., in *Forrester v. Campbell*, who there came to the conclusion that such an equity must still prevail against registration, a decision in which he entirely concurred.

In *Bell v. Walker*, 20 Gr. 558, the Court of Chancery, (Spragge, C., and Strong and Blake, V. CC.,) concur in thinking a purchaser was only protected against an unregistered equity incapable of registration when he had not actual notice of it. Strong, V. C., distinguishes the case from *Wigle v. Settrington*, because notice had not been proved.

In *Haynes v. Gillen*, 21 Gr. 15, Blake, V. C., cites and follows *Forrester v. Campbell* and *Wigle v. Settrington*.

In *Grey v. Ball*, 23 Gr. 290, Spragge, C., treats notice as a protection to such equitable interests, though finding there that notice had not been established.

In *Cooley v. Smith*, 40 U. C. R. 543, the Court of Queen's Bench seem to have accepted the rule established in Chancery, that an equitable interest is protected where the purchaser has notice.

This general consensus of opinion of so many and such eminent Judges is not to be lightly disregarded in construing the statute; and besides the mere weight of authority they carry with them the conviction of correct reasoning and accurate analysis. And we are here concerned only with the construction of the statute, not with the consideration whether on public grounds it might not have been wiser to make the register alone the source of title, and that no regard should be paid to equities that do not or can not appear upon it. Hitherto it has been deemed in accordance with equity and good conscience that no one should have a priority of right to commit a fraud.

In the present instance, when it has been proved or admitted that the plaintiff had a right to redeem the property, although she had conveyed it by an absolute deed, it gave her an estate in the land, not a mere vague equity to a charge or lien on the land; and it would be unjust to permit the defendant, under the shelter of the registry law, to deprive her of this right of which it has been established that he had full notice.

I think the decree should be affirmed, with costs.

DOBELL ET AL. V. ONTARIO BANK AND JOHN ROCHESTER.

Sale of lumber—Construction of agreement—Culling timber—Evidence.

The defendant R. contracted with the plaintiffs to deliver on their vessels at Montreal a large quantity of deals, and he delivered in 1877, all but 108 standard hundreds. These could not be shipped till the spring of 1878, and R. required in the meantime to receive payment for them. He had in his yard at Ottawa more than the required quantity of deals; and in place of then separating and delivering to the plaintiffs the 108 standards, he procured his son to give a storage receipt under 34 Vict. ch. 5 (C.) acknowledging the receipt from the Ontario Bank of 108 standard hundreds of deals specifying the qualities required by the contract. The bank thereupon gave a guaranty to the plaintiffs that those deals should "be satisfactorily culled next spring previous to shipment, and that any question arising as to the same shall be settled in the manner usual in Quebec, viz.: Messrs. D. & Co., for purchasers, and Messrs. C. & R., for Mr. R., to agree upon a sworn culler to act in the interests of both parties." Thereupon the plaintiffs paid for the deals, and the bank received the money.

In the spring of 1878 R. forwarded 108 standards to Montreal by two barges, being urged to expedition in so doing by the plaintiffs: and 60 standards were loaded on vessels of the plaintiffs, which sailed with them to England. The quality of the remaining 48 standards was objected to and they were landed at Montreal, and there culled and found deficient in quality. Messrs. C. & R., agents at Montreal for the defendant R., verbally agreed with the plaintiffs, after the 60 standards had been shipped, that the quality of the 48 standards should be taken to be the average of the whole 108.

Held, (SPRAGGE, C.J.O., dissenting), that the guaranty given by the bank only required that the plaintiffs should be satisfied with the culling at R.'s yard in Ottawa, and that no objection having been made there the guaranty was satisfied.

But *held* also, that the bank was not bound by the agreement made at Montreal by C. & R., and even if the culling were to have been at Montreal the shipment of the 60 standards having rendered it impossible to settle the question in difference in the manner agreed upon, the bank would have been discharged.

Held, that a copied specification of the entry of a culler's measurements in the books of the supervisor, signed by the supervisor or his deputy under C. S. Can., ch. 46, sec. 19, is receivable as evidence of such measurements.

APPEAL from the judgment of Proudfoot, J., who gave judgment against both the defendants Rochester and The Ontario Bank, as reported 3 O. R. 299.

The action was commenced by bill filed by Richard R. Dobell, Thomas Beckett, and Charles Taylor, co-partners in trade, carrying on business in Quebec as "R. R. Dobell & Co.," setting forth that Rochester carried on business as a lumber man ufacture and dealer at Ottawa, having his authorized agents Carbray and Routh in the province of

Quebec, for the sale of his lumber, &c.; that on the 3rd of May, 1877, Carbray and Routh, as such agents, entered into an agreement in writing with J. Bland & Co., of Liverpool, England, which firm was composed of the plaintiffs and one Fleming, who subsequently died, leaving the plaintiffs the surviving partners, for the sale and delivery to them of a quantity of pine deals, to be divided into three qualities, as regarded the culling thereof, viz., 15 per cent, of 1st quality; 43 per cent of 2nd quality, and 42 per cent of 3rd quality at certain stipulated prices, according to their respective qualities.

The bill further stated that during the year 1877 a large portion of the said deals was delivered, for which R. was paid, leaving about 108 standard hundred deals to complete the quantity agreed to be delivered.

The bill further stated that the defendant Rochester was about this time largely indebted to the Ontario Bank for advances made to him in carrying on his business, and having pressed him for security on account of such indebtedness, he did, on the 20th November, 1877, give to Edward Rochester (a son of the defendant) possession of certain deals, who, at the request of defendant Rochester, gave, as part security to the bank, under the Act relating to warehouse receipts, a warehouse receipt as follows:

“WAREHOUSE OR STORAGE RECEIPT.”

“Received in store in the yard of John Rochester, Esq., at Ottawa, province of Ontario, from the Ontario bank, the lumber,” specifying it, “To be delivered to the order of the Ontario Bank, to be indorsed hereon.” * * *

The bill further stated that John Rochester had acquainted the Bank of the agreement for the sale of deals to Bland & Co. and that the same had not been fully carried out, and that both defendants being desirous of realizing upon the said lumber they did, by their agents, offer to deliver to Bland & Co. the deals so held by the bank as a performance of the balance of the agreement between Rochester and Bland & Co., but in consequence of Bland & Co. being dissatisfied with the culling of the

deals delivered in the previous summer they objected to receive those held by the bank under the warehouse receipt or pay therefor unless the culling should be satisfactory, and in accordance with the usual requirements respecting the culling of deals intended for shipment to England, but the plaintiffs acting as well on their own behalf as for the English firm, agreed to receive the said deals from the defendants and accept the same under their contract with Rochester, if the bank would give them a guaranty that the deals should be satisfactorily culled; and that any quantity short should be paid in cash by the bank; and that to this the bank assented and thereupon John W. Woodman, agent and manager of the bank at Ottawa, signed the undertaking agreeing to such culling, a copy of which is set out 3 O. R. at p. 301, and in the judgment. After receiving this undertaking the plaintiffs delivered to the bank a bill of exchange on Bland & Co. for £1,274 15s. sterling which was duly honored, and accepted as a full payment of the said 108 standard hundred deals.

The bill further alleged that afterwards and during the spring and summer of 1878 the said deals were sent to Carbray & Routh for the purpose of being delivered to the plaintiffs but without having been culled, and a portion thereof, amounting to about 60 standard hundred deals, were placed on board a vessel of the plaintiffs at Montreal by Carbray & Routh, which the plaintiffs did not see before being placed on shipboard; but, before the whole quantity was loaded the plaintiffs objected to the culling, and refused to receive the deals unless they were properly culled in pursuance of the undertaking of the bank; and it was then arranged between the plaintiffs and Carbray & Routh that in consequence of the sixty standard hundred deals having been loaded as stated, that they should be allowed to proceed on the voyage, and that the forty-eight remaining on the docks at Montreal should be re-culled; and in case after such re-culling any alteration should appear in the description and quality of the forty-eight standards in regard to culling, the sixty so shipped

should be altered in the same proportion as the forty-eight so actually culled. That thereupon the services of a duly authorized culler were obtained who proceeded to cull the timber as agreed upon, and the result of such culling was that a large deficiency existed in the quality of the forty-eight standards, amounting in value to about £148 4s. 3d. sterling, and in the same proportion the deficiency of the 60 so shipped amounted to £168 10s. 7d. sterling, making the total deficiency or over payment on the whole 108 standards £316 14s. 10d. sterling or \$1,539.40, for re-payment of which the plaintiffs had made frequent applications to the defendants but this they refused to do.

The prayer of the bill was that an account might be taken of what was due to the plaintiffs in respect of these transactions and payment thereof by the defendants.

The defendants severally answered the bill, and the trial of the action took place at Ottawa, when evidence was given, the effect of which sufficiently appears in the judgments.

In addition to the letters set out at length in the judgments and in 3 O. R. 299 the following letters and telegrams were proved to have passed between the parties :

Montreal and Quebec.

Memorandum.

Montreal, 21 Dec., 1877.

FROM CARBRAY & ROUTE, 299 Commissioners street, Montreal, to JOHN ROCHESTER, Esq.,

The bank has been writing to Mr. Carbray, objecting to write the letter Dobell asks for. They don't understand the question, so please explain it to them :

Dobell don't want bank to guarantee the culling, as they seem to fear ; all that he asks (refer to his letter) is, that if the deals are not found as per warehouse receipt when he comes to take delivery, that bank will refund the money overpaid. This is very simple and quite just, and bank cannot object to refund money for which they do not give value.

C. & R.

Montreal, 2 January, 1878. Canada.

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR,—Referring to our last of 21st December, we have still no word from you respecting letter for Dobell. Is this affair to fall through for such a trifle, when all Dobell wants is a guarantee that money will be

returned to him if the deals are not on hand. This is as we understand the question.

We think, in your interests, we should *at once* (by next mail) send our agents a memo. of your new cut, so that if anything is moving before our arrival they may be able to take advantage of it. Please, therefore, send us particulars by return mail.

Wishing you a successful year's business,

We are, dear sir, truly yours,

CARBRAY & ROUTH.

Quebec, 2nd May, '78

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR.—How soon can you have our deals in Montreal? Don't send them down without instructions from us, but let us know how many days' notice you will require.

Yours truly,

R. R. DOBELL & Co.,

p. D. BELLHOUSE.

Chaudiere Steam Mills, Ottawa, May 6th, 1878.

MESSRS. R. R. DOBELL & Co'ys.,

Lumber Merchants, Quebec.

DEAR SIRS,—Your favor of the 2nd inst. duly to hand; and as I have not yet put on any "hands" (not having commenced running mills) I would be obliged if you could leave over shipment of deals till some time in June.

The deals will have to be re-culled here, since they were objected to by your culler. How do you propose having the culling done?

Yours truly,

JOHN ROCHESTER,

per Nl. McIntosh.

Quebec, 8 May, 1878.

JOHN ROCHESTER, Esq., Chaudiere Mills, Ottawa.

DEAR SIR,—In reply to your letter of 6th, we would gladly accede to your wish, but we have ships now in the river that will take the deals.

We would therefore like you to have them loaded as quickly as possible, and sent to Montreal. As regards the culling, we only want what is right, and we look to you to have them properly culled in Ottawa. Please give this your best attention and oblige.

Yours truly,

RICHD. R. DOBELL & Co.

Quebec, 16th May, 1878.

JOHN ROCHESTER, Esq.

DEAR SIR,—We are in receipt of your letter of the 10th, and hope you have arranged to ship us the deals to Montreal. We cannot understand why there should be any delay at all, and we may miss an opportunity of a low freight by your not having sent them. Please oblige us in this, and wire us when you have engaged the freight. If you could arrange to send them to Quebec, we would be willing to pay the extra freight from

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Montreal to Quebec, and if you do this, please let us know at once, and oblige,

Yours truly,

RICHARD R. DOBELL & Co.

Quebec, 17th May, 1878.

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR,—We telegraphed you this morning that we had a ship in Montreal waiting for your deals, and we wished them sent down at once. Please telegraph us on receipt. Your message received; please urge the deals down.

Yours truly,

RICHARD R. DOBELL & Co.

Quebec, 20th May, 1878.

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR,—We are in receipt of your telegram as follows :—"Barges loading, will be in Montreal this week, doing best possible." The ship will not wait after Wednesday, so you must please urge our small quantity down. There can only be about two barge loads, and we gave you timely notice, and did not anticipate this trouble.

We hope you have been careful in the culling, and that there will be no cause of complaint.

Yours truly,

R. R. DOBELL & Co.,
per W. CLINT.

Chaudiere Steam Mills, Ottawa, May 23rd, 1878.

MESSRS. CARBRAY & ROUTH, P. O. Box 1952, Montreal.

DEAR SIR,—Referring to my telegram of date to you, I now beg to advise you that about 75,000 ft. b. m., 1st quality of Dobell's deal, order "G," left here last Tuesday night, and that the balance of the order leaves here to-night. Specification of the whole lot will be sent to you to-morrow, that is as soon as it can be made out. I trust you will attend to this shipment particularly, as I have no doubt Dobell will have the deals thoroughly overhauled, and apologizing for the overlook of not communicating with you sooner about this matter.

I remain yours, very truly,

JOHN ROCHESTER, per N. McINTOSH

Quebec, 25 May, 1878.

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR,—We thank you for your telegram of this morning, but we are yet without information of how many deals you sent down on 1st barge. Allans complain that there was only the deck-load of our deals, but we cannot think this can be correct. They will not wait for the 2nd barge, so they will have to be piled, and re-shipped in some other vessel. We are much disappointed that this is so. We also regret to learn that the quality is not right; we trusted to you to treat us fairly, but we will not say more about this until our Mr. Dobell sees the remainder, which he will do next week, as he is going up on Monday night.

Yours truly,

RICH'D. R. DOBELL & Co.

Chaudiere Steam Mills, Ottawa, May 24th, 1878.

MESSESS. CARBRAY & ROUTH, P. O. Box 1952, Montreal.

DEAR SIR,—Enclosed I beg to hand you specification of balance Order "G" (Dobell lot) last barge of which left last night.

B/L will reach you through Ontario Bank as usual:

Amount received from Dobell and Co'y., last January on this deal is, as you are already aware \$6104.63.

Yours truly,

JOHN ROCHESTER

per N. McINTOSH.

Enc:

Ottawa, May 24th, 1878

By Telegraph from Quebec.

To JOHN ROCHESTER.

Telegraph us what qualities you shipped in the first barge.

R. R. DOBELL & Co.

May 24th, 1878.

R. R. DOBELL & Co'y., Quebec.

Firsts. Full specification has been mailed to Routh to-day.

JOHN ROCHESTER.

per N. McI

Quebec, 24th May, 1878.

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR,—We have as yet no word from you what you have actually loaded for the "*City of Montreal*."

To-day we have a letter from Montreal, which we cannot understand. It says that the "*Caspian*" has only the deck load of our deals, the remainder being for Messrs. J. Burstall & Co., and that the barge "*Tubin*" only left Ottawa last night. We need not say the delay in this matter has given us much disappointment, and we are a little disappointed that you have not sent the deals down earlier when we ordered them. We have wired you to-day to know exactly what was on the first barge.

Yours truly,

RICHARD R. DOBELL & Co.

May 27th, 1878.

To JOHN ROCHESTER, Ottawa.

Specifications of barges mixed; cannot you give specification of "*Caspian*" separate.

R. R. DOBELL & Co.

May 27th, 1878.

R. R. DOBELL & Co., Quebec.

Sorry, but cannot give you separate specification for "*Caspian*."

JOHN ROCHESTER, per N. McI.

Quebec, 27th May, 1878.

JOHN ROCHESTER, Esq., Ottawa.

DEAR SIR,—We have received the specification and invoice of the deals through Carbray & Routh, but the second barge was so long in leaving Ottawa, that the "*City of Montreal*" could wait no longer. She waited a whole week for them, and only took the barge "*Caspian*." We hope you can give us the specification of what was in the first barge. Please send it to us here at once.

Our Mr. Dobell goes up to Montreal to-morrow, to inspect the "*Toupin's*" deals, as our agent advises us that the culling is not satisfactory.

Yours truly,

RICH'D R. DOBELL & Co.

Your message just received; we cannot understand why you did not keep separate specifications of the barges.

R. R. D. & Co.

The appeal came on to be heard before this Court on the 24th and 25th of January, 1884.*

S. H. Blake, Q. C., and *W. H. Walker*, for the appellants.
Robinson, Q. C., for the respondents.

The other facts of the case and the points raised by counsel appear in the judgment.

March 4th, 1884. SPRAGGE, C. J. O.—The first point to be considered is the position of parties when the guaranty of the bank was given. The terms of guaranty given by the Bank agent at Ottawa, 9th January, 1878, are as follow: "That the deals held by Messrs. Dobell & Co., under warehouse receipt from J. Rochester, dated November, 1877, say 108 standards, shall be satisfactorily culled next spring previous to shipment, and that any question arising as to the same shall be settled in the manner usual in Quebec, viz.: Messrs. Dobell & Co. for purchasers, and Messrs. Carbray & Routh for Mr. Rochester to agree upon a sworn culler to act in the interests of both parties." Then provision as to loss by fire or tempest.

Then under what circumstances was this given? The Bank had made advances to Rochester, and the agreement was that Dobell & Co. instead of making payment for the deals to Rochester should pay to the bank the price of them. The deals were to be of three qualities, and the agreed price was so much per standard for each quality. It was contemplated that Dobell & Co. should pay to the

**Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.,

Bank the full agreed price for each quality, but inasmuch as some of the deals delivered might turn out to be of inferior quality, and so should be rated at a lower price, the consequence would be that as to those Dobell & Co. would have paid beyond the stipulated price for them; and as the payment by Dobell & Co. to the Bank was to be in advance of the culling, an agreement that the Bank should repay any over payment, was in the ordinary course of business.

The letter of Dobell & Co. to Carbray & Routh, Rochester's agents, of 10th December, 1877, (a) explains their position clearly, and the memorandum of Carbray & Routh to Rochester of 21st December, though not so clear as it might be, puts the matter substantially in the same light. See also letter Carbray & Routh to Rochester of 2nd January, 1878, ante p. 487.

It was under these circumstances that the guaranty was given and to answer the above purpose.

The guaranty is not well expressed. It should have gone on to say that which Carbray & Routh in their memorandum understood it to say. The paper does in terms guarantee a satisfactory culling in the spring. That was for some purpose, and could be for no other purpose than to ascertain whether the deals answered the description according to which they had been paid for. If they did not there would be an over payment. The result of the spring culling would shew how that was. If an over payment, ascertained in the mode agreed upon by the Bank and Dobell & Co. as well as by Rochester, it would follow as a matter of law that the party receiving the over payment would be bound to repay the sum over paid to the party paying it.

Then to what deals did this apply? Plainly to the 108 standards which were to be delivered by Rochester to Dobell & Co. at Montreal contemplated to be in the spring following, and the ascertainment of quality was, as I read the agreement, to be there. The terms of the guaranty and the whole correspondence, I think, shew this. It

(a) See post 499.

would be no answer to Dobell & Co. that although the 108 standards sent to Montreal in pursuance of this contract were inferior in quality, and so entitled Dobell & Co. to some repayment from the Bank, still Rochester had in his son's yard in Ottawa sufficient deals of the proper quality to make good the deficiencies in those sent—the guaranty applied to those sent as in fulfilment of the contract.

Then did Dobell & Co. agree to forego the contemplated culling in Montreal, to accept Rochester's culling in Ottawa? I think clearly not, though some expressions in Dobell & Co.'s letters may lend some countenance to that idea, *e. g.*, what is said in letters of 8th May, 17th May, 20th May, 23rd May, 25th May, ante pp. 488-9.

It is clear from subsequent correspondence that nothing more was intended, and nothing more understood, than the expression of a strong desire on the part of Dobell & Co. that there should be a careful culling by Rochester in Ottawa before forwarding the deals, so that upon the culling at Montreal, there should be as little trouble as possible and as little "degrading" of those sent as possible.

It was taken for granted by Dobell & Co., and not questioned by Rochester, that there was still to be the culling at Montreal. It was not set up by Rochester or by Carbray & Routh that the culling in Ottawa was to be in substitution of the agreed culling in Montreal.

I had written so far, and had assumed it as certain that the culling spoken of in the guaranty was a culling at Montreal, when my brother Patterson shewed me what he had so far written upon the subject. This has induced me to again go over the correspondence and other documentary evidence, and unless there is something in the oral testimony to shew the contrary, I should still think that the culling spoken of was a culling at Montreal previous to shipment at that port.

The original agreement was for delivery at Montreal free on board—the ships for the sea voyage to be provided by Dobell & Co., and the deals to be placed on board by Rochester, and I think that the subsequent correspondence

ter of legal obligation under the guaranty, and it is only in that shape that it has been or can be before us, and upon that I can come to no other conclusion than that Dobell & Co. fail in establishing their claim.

PATTERSON, J. A.—A question has been raised about parties which I may as well deal with at the outset. The action is brought by Messrs. Dobell, Beckett and Taylor who, together with a Mr. Fleming who is now dead, and a Mr. Pearce, were trading as partners at Liverpool as the firm of James Bland & Co., and at Quebec as Dobell & Co. in May, 1877, when a contract which is now in question was made, and in 1878, when the causes of action arose, if they ever did arise. That partnership was dissolved about the beginning of 1880, as I gather from Mr. Dobell's evidence, and two or three months before this action was begun. At the dissolution, Messrs. Dobell and Beckett, who live at Quebec, assumed, or took over, as Mr. Dobell expresses it, all the interests of the two firms on this side of the ocean, and Messrs. Taylor and Pearce, who live in England, took over all the interests on the English side. The objection as stated in the defendant Rochester's reasons of appeal, is in effect that the contract, which was made in Liverpool by J. Bland & Co. with an agent of Rochester, had passed on the dissolution to the Liverpool members of the firm, and that the plaintiffs did not, at the time of the filing of the bill, constitute or represent the persons who were beneficially interested. I have to confess myself unable to appreciate the force of this objection. In the first place the fact assumed is not made out. My own impression is that, from what is to be gathered from the few words casually educed from Mr. Dobell in answer to a question about the firms, the beneficial interest is in Dobell and Beckett, and that Taylor may perhaps be an unnecessary party. I do not understand how the circumstance that the first contract with Rochester happened to be made in Liverpool touches the legal question; but if the *locus contractus* is to be regarded, it happens that the present dis-

pute relates to an extension of the original contract with Rochester and to a contract with the Ontario Bank which was collateral to Rochester's contract if not independent of it; and both of these were arranged by Mr. Dobell on this side of the water.

But even if the English partners were shewn to have retained the whole interest in the chose in action arising from the breach of contract, which is alleged to have occurred between one and two years before the dissolution of the partnership, and nearly two years before this action, we do not know that the plaintiff Taylor would not represent the whole of that interest. He is said to have formed a new partnership of which Mr. Pearce is or was one of the members, but no inquiry has been directed to the question whether, as between him and Mr. Pearce, the latter had still any interest in this chose in action. On the materials before us it seems to me impossible to say that the action is not properly constituted.

If an amendment were necessary, there is no technical reason why it should not be made. The argument to the contrary overlooked the presence of Mr. Taylor as a plaintiff.

The action against the Ontario Bank is founded upon a document dated 9th January, 1878, signed by Mr. Woodman, the manager of the branch of the Bank at Ottawa, and addressed to Messrs. Dobell & Co. Before reading it I shall state my understanding of the dealings which led up to it as I do not understand them in exactly the same way as they are noted by the learned Judge in his judgment in the Court below.

On 3rd May, 1877, Messrs. Carbray & Routh, as agents for the defendant John Rochester, entered into a written contract with J. Bland & Co. for the delivery of two cargoes of lumber "to be loaded in the usual and customary manner at Montreal, to be merchantable and of the quality described according to seller's usual classification and Quebec culling; the prices are all in sterling money, free on board, per St. Petersburg standard of 1980 feet inch

board measure, and payment to be made by purchasers' acceptance of the seller's draft at 120 days sight, (payable in London) on presentation of invoice and bills of lading." This is all that is material to note of the contents of the contract at present, except that the quantity specified was about 500 to 600 St. Petersburg standards bright pine deals in specified proportions of 1st, 2nd, and 3rd quality, to be delivered one cargo about 1st June, and one cargo about 20th June.

This contract was fulfilled—the full amount of 642 standards having been delivered and paid for before the extension of the quantity was settled.

We have not any distinct information as to the extension. What we know is, that in some way Messrs. Dobell & Co. or Bland & Co. became bound to take a further quantity which they had power to fix within certain limits; and that on or about 17th November, 1877, Mr. Dobell exercised the option of taking the minimum quantity, viz., three cargoes of 250 standards each, making 750 standards which, deducting the 642 already shipped, left 108 to be delivered, in these proportions: viz. 75 of firsts, 16 of seconds, and 17 of thirds. It is evident that all the terms of the May contract could not apply to this November extension. One thing certain was, that the lumber could not be shipped that season. It had to remain in Rochester's yard at Ottawa, and what was proposed was that a warehouse receipt for it should be given by Edward Rochester a son of the defendant, as warehouseman, and thereupon that the buyers should accept the seller's draft for the price.

At this point of the history the Bank appears. John Rochester, the defendant, was largely indebted to the Bank, and the Bank held a lien or mortgage in some form upon his property, but of course allowed the business to go on, receiving on his account the proceeds of his sales of lumber.

The warehouse receipt for the 108 standard hundreds was to be given by Edward Rochester to the Bank, and by the Bank indorsed over to Dobell & Co. or Bland & Co.

Preparatory to taking the receipt, Messrs. Dobell & Co.

sent a man to examine the deals in the yard, and he is said to have been dissatisfied with the culling, by which I understand he could not accept any certain piles of lumber as containing the qualities to which the plaintiffs were entitled and in the necessary quantity. Rochester therefore proposed that a sufficient number of piles should be marked to make the plaintiffs quite safe, and that in the spring a culler from the supervisor's office at Quebec should be appointed by Mr. Dobell, and by Rochester's agents, Carbray & Routh, who should recull a sufficient quantity to satisfy the warehouse receipt.

Referring to this proposition Mr. Dobell wrote to Carbray & Routh the following letter :

"QUEBEC, 10th Dec., 1877.

"Messrs. CARBRAY & ROUTH, Quebec.

"DEAR SIRs,—In reference to the deals invoiced to us by you for Mr. Rochester, and delivery-order for same from Bank of Ontario, we have to advise you that having sent up our culler to inspect the deals, he reports that the culling is not at all according to the Act, or satisfactory.

"We note that Mr. Rochester proposes to have them re-culled in the Spring, and to make them right, but from the specification you have given us there is no margin in quantity in case the deals do not turn out right, as there is only a surplus of about 500 standards over and above the specification we require to complete our contract. If, however, the Ontario Bank will give us a guarantee that the deals shall be satisfactorily culled next Spring, and that any quantity short, they will repay us for in cash, we shall be glad to hand our bill as per your account rendered.

Yours truly,

RICH'D. R. DOBELL & Co."

Then ensued a good deal of correspondence between Rochester and his agents, and the officers of the Bank. At length the Directors of the Bank, at a meeting on the 28th December, 1877, passed a resolution in these words :

"Ordered, that Mr. Woodman be requested to employ some competent person to measure and examine the Deals now in Mr. Rochester's yard and sold through Messrs. Carbray & Routh, and if the quantities and qualities are found to correspond with that expressed by the Warehouse Receipt, he may give the guarantee asked for by Messrs. Dobell & Co., all accidents by fire being at their risk."

Mr. Woodman did not have the examination made, for

reasons explained in his further correspondence which is in evidence; but, having satisfied himself that there was enough lumber in the yard, he gave the guaranty on 9th January, 1878, which I shall now read.

ONTARIO BANK, Ottawa, Jan. 9, 1878.

"To Messrs. DOBELL & Co., Quebec.

"I hereby guarantee on behalf of the Ontario Bank, that the deals held by Messrs. Dobell & Co., under warehouse receipt from J. Rochester dated Nov'r, 1877, say 108 standards, shall be satisfactorily culled next spring previous to shipment, and that any question arising as to the same, shall be settled in the manner usual in Quebec, viz :—Messrs. Dobell & Co., for purchasers, and Messrs. Carbray & Routh for Mr. Rochcater, to agree upon a sworn culler to act in the interests of both parties. It being distinctly understood that any loss by fire or tempest, after the date of the receipt above referred to, shall be at the risk of the purchaser.

"J. H. WOODMAN,

"Manager Ontario Bank, Ottawa."

It is upon the proper construction of this document that the question of the liability of the Bank mainly turns. There are other questions which have been argued touching the power of the banking corporation to enter into the engagement, the power of Mr. Woodman to bind the Bank by it, having regard to the resolution I have referred to, and to the absence of the common seal of the corporation, as well as some other matters. And there is of course the question of the fulfilment of the undertaking, if it was binding. But whether or not it may be necessary to discuss these questions, we must begin by forming an opinion of the meaning of the document itself.


The deals were to be "satisfactorily culled next spring previous to shipment."

In the first place, I understand this to refer to culling before shipment from Ottawa, or in other words, at Rochester's yard. The object of the guaranty was to secure the delivery of the lumber covered by the terms of the warehouse receipt. If the plaintiffs' culler, when he went up in November, had found the lumber in proper quantity and quality, separated and piled so as to be, to his satisfaction, appropriated and marked as the plaintiffs'

property, the guaranty would not have been required, and would not have been asked for. The proposal to which Mr. Dobell assented was that what had not then been done should be done in the spring, provided the Bank would give the guaranty. His letter of 10th December makes this clear. His doubt was that there was enough there to make up the specification, and as he was paying for the whole, he required to be secured that *any quantity short* should be repaid for in cash.

No culling at any other point had up to this time ever been spoken of, so far as we are told. The 642 standards had gone forward without any intermediate culling, and, after this, we are told that one barge load of the lot in question had been sent off, and part of another loaded on the *Peruvian*, without any suggestion that the bargain involved any culling other than what ought to have taken place in Ottawa. This understanding of the agreement is further borne out by correspondence and evidence of Mr. Dobell to which I shall presently refer for another purpose; and the whole correspondence and evidence is to my apprehension consistent with what I take to be the correct interpretation of the guaranty in this first particular, namely that it pointed to the delivery of the lumber from the yard, in fulfilment of the warehouse receipt. The form of the transaction was that the Bank became surety for the warehouseman rather than for the seller, undertaking in effect that when the spring came, the warehouseman should have ready for delivery deals sufficient in quantity and quality to afford, on a satisfactory culling, what was called for by the receipt.

It is important to keep in mind the object of the guaranty. Mr. Dobell doubted that there was enough first quality deals in the yard to supply him, no less than seventy per cent. of the 108 standards being required to be of that grade. For want of proper assorting the lumber could not be set apart in the autumn, and that assortment or culling was therefore to be done in spring before shipment. We must not allow the relationship between the



two Rochesters, which possibly may have led to a looser way of doing business than if the vendor and the warehouseman had been strangers, to divert our attention from the shape in which the parties concerned put the affair. The lumber could only be obtained from the warehouse by the holder of the receipt or some one with his order, and when once delivered and taken away the warehouseman was discharged.

The questions which a sworn culler might be called upon under the agreement, to adjust were such as might arise in the process of culling, as *e.g.* when the plaintiffs might insist upon the selection of better stuff than such as was being allotted to them. All this necessarily had reference to the place where the bulk was from which the culling was to be made. The liability of John Rochester to deliver the deals on shipboard at Montreal creates no difficulty. He would have had to do that even if the deals had been properly culled and assorted, and warehoused by an independent warehouseman, in the fall. That is a matter quite separate from the Bank's undertaking, which I think cannot be held to guarantee the fulfilment by John Rochester of his contract including risk of loss in transit to Montreal and all other contingencies.

For these reasons I think the *shipping*, before which the culling was to be done, must be understood to be the shipping from Ottawa, and not the delivery at Montreal.

Secondly, the undertaking was, that the deals should be *satisfactorily culled*.

This I understand to mean that they should be culled to the satisfaction of the plaintiffs. The plaintiffs were entitled to receive from the warehouseman a certain quantity of certain qualities. They were not bound to accept anything short of that. The guaranty was that they should be satisfied that what was delivered from the warehouse was what the receipt specified, and there was a very proper provision for deciding any dispute which might arise. Such a dispute, however, was, as seems clear to my mind, only one which might have arisen had the culling taken

place in November instead of being deferred till spring—that is to say, while separating from the bulk those deals that were to be appropriated to the plaintiffs. The plaintiffs of course were to be represented in order that they might be satisfied, or that the deals might be “satisfactorily culled,” and questions arising at that time were to be adjusted in the mode mentioned in the writing.

Then what took place in the spring? On 6th May Rochester writes to Dobell & Co.: “The deals will have to be reculled here since they were objected to by your culler. How do you propose having the culling done?” And Dobell & Co. reply: “As regards the culling we only want what is right, and we look to you to have them properly culled in Ottawa. Please give this your best attention.” This was on 8th May. During the next fortnight there was much correspondence by mail and telegraph, that on the plaintiff’s part urging Rochester to more speed in sending forward the deals. The culling is alluded to in a letter of 20th May, when the plaintiffs say: “We hope you have been careful in the culling, and that there will be no cause of complaint,” and in letters of 25th and 30th May, where we find the following passages: “We also regret to learn that the quality is not right; we trusted you to treat us fairly but we will not say more about this until our Mr. Dobell sees the remainder.” “We are sorry that in a small matter like this you did not use more care. We wrote you asking you to see that they were fairly culled,” &c.

Referring to this subject, Mr. Dobell was asked by his counsel when giving evidence at the trial: “You did not send any person in the Spring to Ottawa to have them culled?” and answered: “No, it was not our place to do it.” And to the further question: “Then what were you relying upon as to the culling?” he replied: “We relied upon Mr. Rochester culling them properly and sending them down.” This mode of dealing appears to have been the same which had obtained all through the transaction with Rochester. In the cross-examination of Mr. Dobell we find the following dialogue:

Q.—And how were the first two cargoes culled? A.—Badly. Q.—But as to the mode in which it was done? A.—Done by Mr. Rochester. Q.—And where were they culled? A.—At his own mill. Q.—Was that then, as you understood the agreement, the way the culling was to be, so far as place and time were concerned? A.—The culling may be anywhere he liked. Q.—But according to your recollection of the agreement, would that be the place and the time of culling, at Mr. Rochester's yard? A.—He could cull them wherever he liked, the contract didn't cover that. The delivery was in Montreal, and if we had to make objection, Montreal was the point. There was no provision where he culls. Q.—He might have culled them at his own mill? A.—Certainly. Q.—And he did as a matter of fact cull at his own mill? A.—He did, and we raised no objection to it, to where he culled.

It might perhaps be wrong to say that the first of these answers was a trifle inconsiderate. It may be merely that no facts are in evidence to enable us to understand how the witness could safely assert that the two first cargoes which had gone forward without being culled except by Rochester, and had been received in England before the extended contract now in question had been definitely arranged, were badly culled. What is important is, that the culling had been left to Rochester; and that, with the information Mr. Dobell had respecting those first two cargoes whatever was the nature of that information, and with the knowledge that in November his man had objected to the culling of the deals then in the yard, in consequence of which it had been arranged that they should be reculled before shipment in the spring, and in reply to the letter of 6th May from Mr. Rochester's office which called attention to that arrangement and asked how the culling was to be done, the business was still confided to Rochester, and the deals shipped from Ottawa as culled by him only, with the knowledge and even under urgent pressure of the plaintiffs. And that no other culling was contemplated is further shewn by the circumstance already alluded to that the transshipping from the barges to the ocean steamers went on, just as in the case of the first cargoes, until it was casually discovered that Rochester had been unfaithful.

I do not see that we could, with propriety, hold that the bank's liability continued after the deals had, under the circumstances I have mentioned, left the yard at Ottawa.

In addition to the reasons I have given, there is another which, even if my interpretation of the guaranty is wrong, would be fatal to the claim against the bank, and that is the conduct of the plaintiffs in sending away more than half of the lumber, which made it impossible to adjust any question such as they now raise, in the manner in which, by the terms of the document itself, questions were to be adjusted. The sixty standards which had been carried off by the *City of Montreal* and the *Peruvian* were beyond the reach of the Quebec cullers. There was no obligation upon the bank to treat the remaining forty-eight as representing a fair average of the whole; and from some telegrams and letters it seems that the specifications sent by Rochester did not distinguish the one barge load from the other, or shew the qualities shipped by the barge *Caspian*, which discharged into the *City of Montreal*. [See telegrams of 24th and 27th May, 1878, and plaintiffs' letters of same dates. Ante pp. 490-491.]

The learned Judge in the Court below held the bank bound by an agreement, which he considered that Carbray & Routh had made, to treat the sixty standards as of the same range of qualities as the forty-eight. I say nothing at present of the sufficiency of the proof of any such agreement, but merely remark that his opinion that it bound the bank was formed in connection with the view, which he took, and which, after what I have said, I need not say I do not assent to, to the effect that the transaction was, in essence, a sale of the deals by the bank to the plaintiffs, in which Rochester acted on behalf of the bank, with power to bind the bank by his acts in carrying out the transaction, one of his acts being the constitution of Carbray & Routh sub-agents.

I may, however, remark that in one or two particulars, the evidence, as reported to us, does not seem to give the facts exactly as the learned Judge appears to have under-

stood them at the trial. The agreement just referred to is spoken of in the judgment as made in order that the vessels then loaded might sail without the delay and expense of unloading and reloading their cargoes; and on that understanding the agreement appeared to the learned Judge to be a reasonable one, as undoubtedly it might have been. I gather, however, from the notes of the evidence that the vessels, or at all events, the *City of Montreal*, which carried some forty-seven standards out of the sixty, had sailed before any question arose, and I do not notice any suggestion having been made that the deals loaded on the *Peruvian* should be taken off again. The other matter is what the learned Judge speaks of as the bank's recognition of the action of Rochester in shipping the lumber, and its declining to pay the plaintiff's demand because Rochester made objections to the payment. This refers, I think, to some correspondence between the plaintiffs and the manager of the Ottawa branch of the bank, after the plaintiffs made the claim now in suit. All that correspondence strikes me as simply shewing that Mr. Woodman, the manager, treated the plaintiffs' claim as one made against Rochester, and properly, on that understanding, declined to settle Rochester's affairs except upon authority from Rochester. Taking Mr. Woodman's letters and his evidence altogether, he appears to me to have understood the position of the bank with reference to the guaranty and the whole transaction very much as I have attempted, in what I have said, to explain it.

If this view of the bank's position is correct, it is not important to consider the other questions raised by Mr. Walker.

The liability of John Rochester has to be determined by an examination of the evidence so far as it relates to his contract.

It is not disputed that he was bound to furnish the 108 standards, comprising deals of first, second, and third qualities in the ratio of 75, 16, and 17. He delivered on shipboard sixty standards, which were taken by the two steamers.

without any note or specification being kept of the proportions of the different qualities comprised in those shipments. The general specification of the 108 standards which he furnished is not in evidence, but I infer from figures contained in an account prepared by the plaintiffs for the purpose of computing their claim, and rendered to the defendant, that the total number of pieces had been stated as 5,955, of which 4,305 were classed as first quality, 829 as second, and 821 as third.

The receipts given by the shipping agents of the plaintiffs for the deals shipped shew 2,347 pieces taken by the *City of Montreal*, and 1,000 pieces by the *Peruvian*, leaving 2,608 pieces which ought to have been found on the wharf at Hochelaga. The statement returned to the supervisor's office by Locquelle, if it may be looked at, represents that he found only 2,586 pieces, 22 being missing; and Mather and McClymont, when they were there two or three months later, found only 2,579, seven pieces more having apparently disappeared.

The objection made by the plaintiffs is not to Rochester's measurements, for in their account, which is founded on Locquelle's return, they treat the deals measured on the wharf as containing the same number of standards as by Rochester's specification. I do not know how they fixed the quantity as being that which Rochester assigned to these particular pieces, whether by an average estimate or by taking Locquelle's measurements. They did, however, treat them as having been specified as of the same number of feet arrived at by Locquelle, but as being very incorrectly classified.

The evidence adduced of the result of the culling of the deals by Locquelle, who was dead before the trial, was a copy, certified by the deputy-supervisor of cullers, of Locquelle's return to the supervisor's office. It was objected that this was not receivable in evidence, but in my opinion that objection was not well founded.

Locquelle was a sworn culler appointed and acting under the statute C. S. Can. ch. 46. He was sent to cull this lum-

treal were worse than those left behind, the correspondence cannot be regarded as dissenting from the propriety of judging the whole by the sample. Then there is Rochester's letter to Carbray & Routh, dated 9th September, 1878, in which he acknowledges theirs of the 4th, which conveyed the plaintiffs' new proposal to have the deals re-culled and let the result settle those shipped and unshipped, and begs them to try and shelve the matters until after the approaching elections, when he would go down and have everything settled.

This was followed, on the 17th September, by a letter from the plaintiffs to Carbray and Routh warning them that if they wished to have the deals, which the plaintiffs were then proposing to ship, examined again to satisfy themselves for the interests of the bank or Mr. Rochester, they had better do so at once, whereupon Rochester sent Mather and McClymont to examine them. Through all this we find no expression of dissatisfaction with the proposal as to testing the whole by the part. That of course is by no means conclusive, but at present I do not see that it would not be proper for a jury to consider, not as evidence of an agreement to abide by the proposed test, but as aiding them by such assent as they might infer to have been tacitly given by the defendant to the fairness of the proposal, in themselves concluding that the test was one which might fairly be applied by them in measuring the plaintiffs' damages.

It appears that Rochester made some computation, founded on Mather and McClymont's figures, by which he fixed the sum of \$218.36, as that which he owed the plaintiffs. We have not that computation before us, and cannot therefore say whether or not it was based on an estimate of deficiencies in the whole 108 standards. I should not be surprised to find that it was so, although I should have thought the deficiency would come to a larger sum, perhaps nearly twice the amount mentioned.

If in the Master's office it should appear that Rochester's account reckoned the whole 5955 pieces on a ratio of quali-

ties corresponding with Mather & McClymont's classification of the 2,579 pieces, there would of course be no longer question of the propriety of that principle of dealing with the sixty standards. What would remain would be, question of the scale to be adopted, whether Locquelle Mather & McClymont's, or any other. I have no doubt that that founded on Locquelle's survey ought to be adopted unless the Master were satisfied that it ought to be rejected by reason of improper interference by the plaintiffs' culler. At the hearing it was proposed to call evidence to prove such interference. The evidence was rejected but I am not sure that I understand for what reason. At present I am of opinion that the defendant ought not to be bound by the return of Locquelle, appeared that he was influenced in doing the work it fesses to record by the plaintiffs or their servant.

I have explained that I think there was sufficient evidence, without Locquelle's return, to warrant the reference to the Master. That return therefore becomes important only as evidence before the Master on the question of damages, and it may, I think, be impeached before the Master by testimony of the kind which was tendered and rejected at the trial.

I think, therefore, the decree should be varied by affirming the reference as to the defendant Rochester, and dismissing the action, with costs, as against the bank; that the appeal of the bank should be allowed, with costs, and that of Rochester dismissed, with costs.

BURTON, J. A., concurred in the views expressed by PATTERSON, J. A.

OSLER, J. A., read a judgment which has not been handed down to the Reporter, also concurring in the opinion of PATTERSON, J. A.

HILLIARD V. THURSTON.

Fire—Inspection of Steamboats—Legislative sanction—Negligence.

Held, [affirming the judgment of Proudfoot, J.] that the evidence which appears below, was sufficient to go to a jury to establish negligence in the management of the defendant's steamboat.

Per BURTON and PATTERSON, JJ. A., the owner of a steamboat navigating the inland waters of Ontario without legislative authority, is liable for loss occasioned to property by fire communicated thereto by the steamer without any proof of actual negligence.

Per BURTON, J. A., the fact that a steamboat has been granted a licence by the Inspector under the authority of the Act for the Inspection of Steamboats (31 Vict. ch. 65, C.) does not remove, neither was it intended to remove, the common law liability of the owner of such steamboat to a person whose property is injured.

APPEAL from the Chancery Division.

The statement of claim set forth that the plaintiff was the owner of certain saw-mills upon his lands adjoining the Fenelon River, and that the defendant was possessed of a steamboat called *The Ontario*, which was used by the defendant for the purpose of carrying freight and passengers along and on the said river, and which, on the 13th day of July, 1881, was being navigated and worked by and under the management of the defendant's officers and servants. That while such steamboat was passing the saw-mills of the plaintiff, the defendant so negligently and unskilfully managed the said steamboat that sparks from the fires and portions of burning matter escaped and flew from the said steamboat on and upon the said saw-mills of the plaintiff, whereby the same were set on fire, and, together with certain plant, tools, and other chattels therein contained, were burned and destroyed, and the plaintiff lost the same, and the use and enjoyment of the same, and was prevented from carrying on his business.

The plaintiff claimed \$10,000 damages.

By the statement of defence the defendant admitted that he was the owner of such steamboat, which was navigated and managed by his servants, but denied that the said steamboat and firing apparatus were insufficiently and improperly constructed, and alleged that he had all the screens and appliances required for the prevention of

the escape of fire, sparks, or burning material ; and deny all charges of negligence.

The action came on to be tried at the sittings at Peterborough in the Spring of 1882, before Proudfoot, J.

S. H. Blake, Q.C., and *Peck*, for the plaintiff.


Moss, Q.C., and *Hudspeth*, Q.C., for the defendants.

At the conclusion of the case

PROUDFOOT, J.—Seeing the doubtful nature of the fact it would have been better if this case had been tried by jury.

There are two or three questions to be determined. The first is, whether this fire was caused by sparks from the steamboat ; the next, whether there was negligence either in construction or management of the boat.

From the facts and circumstances that appear in the evidence, I conclude that the fire did result from sparks from the steamboat. It is just such evidence would have been made use of, and have been properly submitted to a jury, in case of a man indicted for arson setting fire to the place. Then there is the numerous number of witnesses who testify to the fact of the steamer passing there and almost immediately—within five or ten minutes afterwards—the fire burst out. There is no fire shewn to have been in the neighbourhood, nor to have been within thirty or forty rods or more, except the steamboat's fire. There is not even shewn to be a man with a pipe going around looking at the mill, or in the neighbourhood of the mill, and the only fire within reasonable distance at that time was that down the river at Green & Ellis's mill, some thirty or forty rods off. That was the nearest, and I am not satisfied that it was not further off. I think it was Green & Ellis's shingle mill, not the shingle mill. It was some thirty or forty rods down the river. So that it seems to me that



ber in pursuance of a requisition of Rochester's agents Carbray and Routh, made upon Rochester's express instructions given by letter of 6th June, 1878.

His work was duly returned to the office of the supervisor, and the entry of it there was duly signed by Locquelle in the books in pursuance of section 19 of the statute, which directs that a copied specification thereof having been checked and examined in the office of the supervisor, and being signed by him or his deputy, shall be furnished to the owner of the lumber, or person entitled to the same, as soon as practicable after the measuring, culling, or counting of any lumber is completed, if called for. Such a copied specification was forwarded by Carbray & Routh to Rochester by letter of 21st June, 1878, having been obtained, as they inform Mr. Rochester, on payment of the cost of the culling, office fees and expenses.

The document in evidence is certified as a duplicate copy.

The rules of law respecting the use in evidence of entries made by persons in the discharge of official duties of the class of those of a sworn culler were discussed in this Court in the case of *O'Connor v. Dunn*, 2 A. R. 247.

There cannot, I conceive, be any reasonable doubt of the propriety of receiving, as evidence of the return made by the culler, the certificate given, as the one before us was given, under the authority of the 19th section of the statute, or of the propriety of receiving the return as evidence of the work done by the culler.

There is thus evidence of failure on the part of Rochester to supply the grades of lumber his contract called for. To what extent he failed is another matter, but his failure to some extent is clearly enough made out.

Locquelle classed 1,215 pieces as second class, which was a considerably larger number than there should have been in the whole 108 St. Petersburg standards. Mather and McClymont included even more in that class, their count being 1,243; but they differed a good deal from Locquelle

in the number of pieces they assigned to the first and third qualities.

The decree refers the assessment of damages to the Master. He may of course receive evidence which we have not before us; and although it is not easy to conjecture from what source he is likely to derive information, at all precise, touching the qualities of any of the deals except those examined at Hochelaga, we cannot predict that, even on that point, some evidence may not be forthcoming. It might scarcely be proper at present to say anything on this topic, were it not that an allusion is made by the learned Judge to an agreement by Carbray & Routh that the deals taken away by the steamships should be considered to contain the three qualities in the same proportions as those culled at the wharf. It is urged on the part of the defendant that no such agreement was established, three points being made against it, namely, that there is not sufficient evidence that Carbray & Routh made the agreement; that if made, it was *nudum pactum*; and that their authority as agents of Rochester did not extend to such an act.

If I understood, as the learned Judge appears to have understood, that the agreement was made to save the expense of unloading and re-loading the deals, I should certainly hold against the last two of these three objections; but as I have already remarked, the fact seems to be that the steamships, or, at all events, one of them, had sailed before objection was taken to the culling, and I cannot find evidence to justify the belief that any idea was entertained of unloading the deals, or that such a course would have been practicable. Without a consideration of this kind I think the promise, if made, was a naked promise; and if it was not made in connection with the shipping or handling of these sixty standards, I do not see how it can be brought within the agency of Carbray & Routh.

There is evidence that some arrangement or understanding on the subject existed between Mr. Carbray and Mr.

Dobell, but it seems to have been given almost incidentally, and without the matter being regarded as a fact in dispute. Mr. Dobell, in answer to a question whether the account in which the plaintiffs had stated their claim in detail applied to the quantity shipped as well as to the quantity on the wharf, said: "This explains itself; there are 2,586 pieces re-culled, the claim is based on the whole quantity of 4,308 pieces, including those that were shipped as arranged with Mr. Carbray—that whatever they fell short on this re-cull, those that were shipped should bear the same proportion." This is, I believe, the whole of the evidence of the alleged agreement. It is alluded to in the next question, but that is merely a repetition by counsel of what he understood the witness to have just said. It is thus reported:

"Q. So that all, of course, that you could re-cull were those that were here; and you arranged with Carbray, that those that had gone forward should be dealt with on the culling of those that were behind? A. Yes."

It is clear, from Carbray & Routh's letters to Rochester of 21st June, 1878, and 4th Sep., 1878, read in connection with this evidence, that the matter was spoken of between the plaintiffs and Carbray & Routh; but nothing can be gathered from those letters in confirmation of the assertion that the agents made or assumed to make an agreement on the subject.

In the first of these letters they say: "Messrs. R. R. Dobell & Co. claim that the deals shipped and not reculled should be put on the same basis as those reculled." This was written after the culling by Locquelle. The passage I read from the September letter is this, "Dobell claims that the re-culling was done as agreed, but if you now complain of undue influence, he is willing to allow another survey to be held on them (as the deals are still in Montreal) either by culler's office, or any other competent person or persons mutually chosen, and whoever is wrong to stand the consequences, and let the result of this survey settle deals shipped and unshipped." If it were necessary

to decide the question of fact, I do not think I could hold the alleged agreement established. I am not, however, of opinion that the right to damages in respect of the first sixty standards, or even the right to recover damages on the assumption that the quantities culled on the wharf fairly represented the average character of the whole, necessarily depends on the agreement. If the questions were to be submitted to a jury upon the evidence now before us, without the addition of any further evidence which, for aught we know, may be adduced before the Master, there are several considerations to which I think it would be proper for the Judge to direct their attention. There is first the fact that no separation was made in Rochester's specifications between the different lots as they were sent from Ottawa, and that there is no affirmative suggestion to be gathered from the evidence that the different qualities were kept separate, or that any substantial part would not represent a fair average of the whole. There is the fact that it was proposed to treat the forty-eight standards as fairly representing the whole one hundred and eight; that that proposal was communicated to Mr. Rochester by his agents without any suggestion from them that it was not a fair proposal, and that Rochester does not appear to have expressed any opinion against its fairness. It is true that we may not have his reply to his agent's letter of the 21st June, 1878, and that we may infer from Carbray & Routh's letter to him of the 10th August, 1878, that some efforts had been made to ascertain the character of the deals carried by the *City of Montreal*. In that letter the agents say: "*City of Montreal*. We do not think more details could be got than in the papers. The only deals on board were yours and Eddy's. This is a fact. We will try and get some details out of their shipping agents here." But when we bear in mind that the plaintiffs, as appears by their letter of 15th July, 1878, to Carbray & Routh, and by Rochester's own letter to those gentlemen of 17th August, had asserted that the deals carried by the *City of Mon-*

the fire to a spark or sparks from the appellant's steamboat. The evidence shewed that at the time when the vessel was approaching and passing the respondent's premises, the dampers, bonnets, fire screens, and spark arresters were closed, and every precaution taken to prevent the escape of sparks, and that no spark was seen to escape, or be thrown from the steamboat, while approaching or passing the respondent's premises. They also contended that there was no evidence of want of care on the part of those engaged in the management of the steamboat, and nothing from which such could be inferred other than the fact that a fire occurred after the steamboat had passed the premises but that fact was not of itself evidence of negligence, since its occurring was quite consistent with due care having been taken. Also that the evidence shewed that the appellant had adopted, and had then in use on the steamboat all necessary appliances and safeguards to ensure safety against the casting of sparks, and it was not incumbent upon him to do more than he had done in this respect; and they insisted that the respondent was bound to establish negligence on the part of the appellant occasioning the fire which however the respondent had failed to establish, or to prove that the loss of his premises arose from the want of any precaution on the part of the appellant or his servants. *Downey v. Patterson*, 38 U. C. R. 513; *Carpue v. London and Brighton Railway*, 5 Q. B. 747; *Bird v. Great Northern Railway*, 28, L. J. Ex. 3; *Latch v. Rumner Railway*, 27, L. J. Ex. 155.

S. H. Blake, Q.C., and *Peck*, for the respondent. It is not shewn that the evidence now sought to be introduced could not have been obtained by the appellant for the trial of the action if he had used due diligence, and such new evidence offered was merely corroborative of that already given by the appellant at the trial. The appellant was well aware from the pleadings of the claim made against him, and he should have been prepared to oppose it, and the evidence of the respondent should not have been any surprise; besides the new evidence offered

was not material, and could not have affected the judgment given at the trial. Then again the learned Judge at the trial found as a fact that the fire which caused the loss to the respondent arose from sparks from the appellant's steamboat, and his finding should not be disturbed; and his Lordship also found as a fact that there was careless and improper management of the vessel, and of the appliances thereon to prevent the escape of fire, by servants of the appellant, and his finding in this respect should not be disturbed. The evidence established that all known and reasonable precautions had not been taken, to prevent the escape of sparks from the steamboat: *Robinson v Rapalje*, 4 U. C. R. 289; *White v. McKay*, 43 U. C. R. 226; *Regina v. Slavin*, 17 C. P. 205; *Young v. Moderwell*, 14 C. P. 143; *Fawcett v. Mothersell*, 14 C. P. 104; *Smith v. London and South Western R. W. Co.*, L. R. 6 C. P. 14; *Freemantle v. London and North Western R. W. Co.*, 10 C. B. N. S. 89; *Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 679; *Dimmock v. North Staffordshire R. W. Co.*, 4 F. & F. 1058; *Jaffrey v. Toronto, Grey and Bruce R. W. Co.*, 23 C. P. 553; *Piggot v. Eastern Counties R. W. Co.*, 3 C. B. 229; *Addison on Torts*, 3rd ed., 17.

March 28th, 1884. SPRAGGE, C. J. O.—I think that the learned Judge before whom this case was heard, was right as to the points which were before him for his decision.

The first point to be established in any view of the case is, that the destruction of the plaintiff's mill was caused by sparks from the smokestack of the defendant's steamer. I think it is impossible to say that the learned Judge was wrong upon that point. I incline to think that the evidence preponderates a good deal in favour of his finding. It certainly is not against it, and one cannot read it without seeing that he gave to the case, and to every point in it, the closest attention, assisting by questions put by himself to clear up doubtful points; and to have the case

presented in as clear and intelligible a shape as it was possible to have it.

The question of negligence may be treated as consisting of two branches, one that of faulty construction, the other that of faulty management in steaming along that portion of the river where sparks from the smokestack might be carried to the combustible material on the plaintiff's premises. I cannot say that the learned Judge has gone wrong upon either of these points, and I may add that the evidence impresses me with the idea that steamboat proprietors upon the waters upon which the defendant's plied—not all of them, perhaps, but certainly some of them—have scarcely appreciated their duties and liabilities in relation to the construction of their engines, and the use of appliances in order to prevent the escape of sparks; and the careful and vigilant management of their boats, engines, meshes, and any other appliances that may be used. In nothing perhaps is the maxim *sic utere tuo ut ali-num non ledas* of greater application. It would be well indeed if that just and valuable maxim were more carefully observed in the construction and management as well of railways and all their appliances, as of steamers and all their appliances upon our lakes and rivers. In my opinion the appeal should be dismissed, with costs.

In the view that I take of the case it is not necessary that I should express any opinion in regard to the ground upon which my brother Burton places his judgment, and I only desire to add that I have formed no opinion one way or the other upon it. I cannot say that the learned Judge was wrong in refusing the application for a new trial

BURTON, J. A.—There are, in my opinion, only two questions for consideration upon this appeal.

First, whether there was evidence from which if this had been a jury trial they might properly and reasonably have found that the damage to the plaintiff's property was caused by the sparks from the defendant's steamboat and:

Secondly, whether a case has been made for a new trial.

If it had been necessary to import into the case the question of negligence, I am not sure that I should agree in some of the conclusions of the learned Judge at the trial. It may be that it might not have been proper to withdraw from the jury if this had been a jury trial, the question of whether the mode adopted of getting rid of the exhaust steam through the smoke stack was in itself an act tending to shew negligence or carelessness on the part of the defendant or his servants. I incline to think it was not an act from which a jury might fairly be asked to presume negligence or want of proper care. It is the usual, though not universal means of increasing the speed of the vessel and of utilizing the steam, and according to all the evidence it would not, when the screens were closed, permit the escape of any larger sparks than those thrown out with the ordinary draft whilst the steam itself would have a tendency to extinguish them. But I certainly should not have drawn a conclusion, unfavourable to the defendant from that fact alone. I have not, however, scrutinized the evidence very closely, for, I am of opinion that it was not necessary on the part of the plaintiff to shew negligence.

In my view this case is governed by the principle established in *Fletcher v. Rylands*, L. R. 1 Ex. 265; 3 H. L. 330, and cases of that description, that principle being that where a man brings or uses a thing of a dangerous character on his own land he must keep it in at his own peril, and is liable to the consequences if it escapes and does injury to his neighbour. That principle, applies, I think when a person uses a thing of a dangerous character on a public highway and causes injury to another.

In the present case the defendant, without any statutory authority ran a steamer called the *Ontario* on the Fenelon River, and it seems to me that it was wholly immaterial to the result that the injury arose from no want of care or skill on the part of the defendant's servants in the management of the vessel or in the method of the construction of its boiler and smokestack.

It was urged that inasmuch as this steamboat had been

inspected by the Government Inspector that was equivalent to an authority to use it, and took the case out of the operation of the common law and legalized its use. But the preamble to the Act for the inspection of steamboats shews that the object the Legislature had in view in passing it was the greater security of life and property on board such boats. That certain officials were empowered to examine and report upon the condition of such boats to the Governor in Council, who might direct that the same should not be used or run until permitted to do so by the Inspector.

The license or certificate granted by the Inspector under the authority of the Act, is not intended to remove the common law liability of the owner of a steamboat to strangers. But, leaving that as it stood—for the further protection of passengers and of goods shipped on such vessels, requires the owner to submit to an inspection,

It is the plaintiff who in this case is protected by the common law, and the government inspection does not in any way abridge his right or make it lawful to damage his property without paying for the injury.

This proposition appears no doubt somewhat startling, and is an extension of the liability of steamboat owners beyond what it is generally assumed to be, and I find that in many of the Courts of the United States the Judges have refused to extend the principle of *Fletcher v. Rylands* to cases of this description, but then in many of the American Courts the case of *Fletcher v. Rylands* is denied altogether whilst with us it is a binding authority.

The use of steam in navigating a public river is not only not unlawful, but has, as I have pointed out, received some kind of recognition by the Legislature with regard to inspection, but this is not what is complained of. So long as the fire is not thrown upon another's property there is no ground of complaint. Whenever that occurs the person injured has a right to know by what authority the act causing the injury was done. If the Legislature has conferred upon the party causing the injury the right to use

an element of danger it also protects him, except for the abuse of the privilege—and in such a case therefore, unless it can be shewn that the party was not pursuing the authority conferred upon him, but was guilty of something not covered by the authority, the person injured would be without redress.

In *Vaughan v. The Taff R. W. Co.*, 3 H. & N. 743, the Court of Exchequer held the defendants liable for damages caused by sparks from their engine, notwithstanding that there was no negligence in the construction or use of it, on the ground that as they used an instrument likely to produce damage and causing it they must bear the consequences. And although that judgment was reversed (5 H. & N. 679) it was upon the ground that the Legislature having expressly authorized the use of engines moved by steam, the parties using them could only be liable in case of negligence.

As pointed out in *Furlong v. Carroll*, 7 A. R. 145, a direct analogy may be drawn from the common law rule as to fire. The express Legislative authority in the one case standing upon the same footing as the judicial decisions have placed the case of fire used for the necessary purposes of husbandry.

I asked the learned counsel during the argument if they could distinguish this case in principle from *Jones v. The Festiniog R. W. Co.*, L. R. 3 Q. B, 733, and I understood them to contend that the recognition by the Government inspection under an Act of Parliament was equivalent to legislative authority for the use. I am unable to see how we can hold this defendant excused if that case be good law. Blackburn, J., said: "Here the defendants were using a locomotive engine with no express parliamentary power making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, and if the sparks escape and cause damage the defendants are liable for the consequences."

There is also a case in 3 Q. B. Div., 597, *Powell v. Fall*, to which we were not referred upon the argument, but

which appears to me to bear out this view of the case. There the defendants were under the authority of the Locomotive Act, 1865, empowered to run traction engines, and it was conceded they would have been liable at common law. And Lord Justice Bramwell in delivering the judgment of the Court of Appeal uses this language: "The plaintiffs are protected by the common law and nothing adverse to their right to sue can be drawn from the statute."

It may be that it may be reasonable that steamboat proprietors should be relieved from so serious a liability as this, but for that relief must be sought from the Legislature.

I confess myself unable to distinguish between a liability for an act of this kind between a highway on land and a highway on water; to exempt the parties using a dangerous article of this nature express legislative authority is required.

The question therefore resolves itself into whether there was evidence of the injury having been caused by the steamer as would have made it incumbent on the Judge, if it had been a jury case, to submit the question to them. I do not entertain the slightest doubt that upon this evidence the case could not have been withdrawn from the jury, and there being evidence upon which a jury could properly have found, it is not for this Court to overrule the Judge upon his finding on the facts.

The other ground of appeal is from the Judge's ruling on an application for a new trial.

That motion was based on two grounds—on the ground of surprise and the discovery of new evidence.

I should judge from the affidavits that the defendant had been advised that he was not liable unless the plaintiff could establish that the damage was caused by the negligence of his servants or his having an insufficient screen in the smokestack, and it is probable that his attention was directed more to the establishment of facts which would go to negative negligence than to the fact that the fire originated from the steamer. In this as I have shewn I think

the defendant and his advisers were in error, but he must have known that evidence would be given tending to shew that the sparks came from his boat. The general rule as laid down is, that when a party or his counsel is taken by surprise on a material point or circumstance which could not have been anticipated, and when want of skill, care, or attention cannot be justly imputed and injustice has been done, a new trial should be granted. The defendant did not probably know—as few litigants do know—the precise nature of the evidence which would be given, and I can well understand cases in which evidence has been given which it is shewn could not by possibility have been true, resulting in injury to the litigant, where a Court will interfere, but short of that it is not usual for a Court to interfere on the sole ground of surprise; the rule is, that a party must come prepared before the jury and cannot claim another hearing to remedy a deficiency that might have been avoided, and though it may work harshly in particular cases, it is in the long run valuable in preventing delays which might in some cases be equivalent to a denial of justice.

Then as to the newly discovered evidence; part of this is with the view of discrediting Sullivan, whose explanation of the variance in his testimony is not to my mind very satisfactory.

In a late case (a) I find it laid down that a new trial will not be granted on this ground unless it appears probable that an injustice has been done, and that the new evidence is of such controlling character that it will probably correct the injustice, nor unless it goes directly to the merits of the controversy and not merely to contradict or impeach a witness.

That seems to me to be a reasonable and salutary rule. Now is there anything here which must or ought to have that controlling influence on another trial. One or two of the witnesses now depose to seeing two men coming from the mill shortly before the fire broke out, but there is

(a) *Murray v. Canada Central R. W. Co.*, 7 A. R. 646.

nothing to shew that they set fire to the premises, or that they were using fire, and other witnesses who swear that they had equal opportunities of seeing these men if they had been there say they saw nothing of them. But the strongest ground for not interfering on this ground is, that the application was made to the same learned Judge who tried the case, and who with these additional facts brought to his notice has not thought fit to interfere. The application is one to the discretion of this Court, and when the same Judge who heard the evidence and has thus had and opportunity and advantage of seeing the nature of the new evidence proposed to be given and has refused to interfere it would require a very strong case indeed to be made out to induce an Appellate Court to interfere.

I do not think it is a case on which we should be justified in interfering on either ground, and I must say that I come to the conclusion with some regret, as if the plaintiff had used some precaution in removing or destroying the sawdust this damage would probably not have occurred, although his omission to do so would furnish no answer to this action.

I think therefore that the appeal should be dismissed, with costs.

PATTERSON, J. A.—I am of opinion that we cannot deal otherwise with this appeal than by dismissing it.

I see no sufficient reason for disturbing the findings of the learned Judge who tried the action upon the two questions of fact, viz.: the cause of the fire which burned the mill, and the negligence of the servants of the defendant in allowing sparks, to an avoidable extent, to escape from the steamboat.

But I have not been able to satisfy myself that under our law the defendant is not liable to make good the damage without reference to the want of care on the part of those who had the management of his boat, and even though the appliances for limiting the escape of sparks may have been as effective as would be consistent with the use of his machinery.

I discussed the general subject of liability for damage caused by fire in *Furlong v. Carroll*, 7 A. R. 145. I do not think I can add anything to what I there said. The case of *Powell v. Fall*, 5 Q. B. D. 597, which was not referred to in *Furlong v. Carroll*, seems to be an authority which bears very directly against the present defendant, as it is not easy to distinguish in principle the facts of that case from those in the case before us.

I am not sure that, in the United States, the doctrines acted upon in *Fletcher v. Rylands*, L. R. 1 Ex. 265, 3 H. L. 320, *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, and *Powell v. Fall*, are fully accepted: but I have not sufficiently considered the decisions, many of which are collected in the very useful work, *Thomson on Negligence*, to venture an opinion as to the precise point of divergence, or to say that in any case a rule was acted upon which would not have been applied to the same facts in an English Court. The English rule as laid down in the cases I have mentioned is very distinct, and certainly seems to throw the risk upon the person who uses fire as a motor without legislative authority, rather than upon an individual whose property may happen to suffer.

MORRISON, J. A., concurred.

Appeal dismissed, with costs.

SOUTHAM V. RANTON ET AL.

Married women—Separate estate—Indorsement—Notice of dishonour.

The defendant, a married woman, was entitled to dower in the lands of a former husband who died in 1866, but dower had not been assigned to her. After the death of her said husband she continued to reside on the lands till 1882, when she indorsed a note for the accommodation of her son, and to an action thereon she set up that she had no separate estate, but even if she had, being an accommodation indorser only, she was not liable. A judgment having been rendered against her, she moved for a new trial, alleging in addition to her former defence, want of notice of dishonour. That application having been refused she appealed to this Court, when the ruling of the learned Judge below was affirmed, as the production of the protest for non-payment was sufficient evidence of the notice of dishonour, and there was not any merit in the other defence sought to be raised.

THIS was a suit brought by the plaintiff in the first Division Court in the county of Middlesex under the Division Courts Act, 1880, to recover from the defendant Ranton as maker, and the defendant Morcombe as indorser, \$132.05 the amount of a promissory note, dated 11th Nov., 1882, "interest and expenses."

The defendant Ranton, did not defend, and judgment was entered against him by default.

The case against the defendant Morcombe was tried at the Sittings of the said Court holden at the city of London, on the 27th day of April, 1883, by Charles Robinson, Esq., Judge of the County Court of the county of Lambton, presiding at the said Division Court under the provisions of "The Local Courts Act."

The plaintiff and the defendant Morcombe were the only witnesses examined at the trial, they were sworn and examined in the plaintiff's behalf; and, under the provision of "The Division Courts Act, 1880," notes of their evidence were taken by the presiding Judge as follows:

"Plaintiff—I am a book-binder, Ranton gave me note (produced) gave him credit.

"Jane Morcombe—I signed note produced; my son Ranton asked me to sign it to accommodate him; did not look at it, thought it was blank. I have no separate property; have an interest in fifty acres, was left by my first husband, don't know what my interest is in lot 29 N. boundary, 14th concession Biddulph; my husband made

"no will, I have only the right of dower not set apart; "have been living on it, my children have been living with "me, have seven, have one living with me."

At the trial counsel for the defendant Morcombe called no witnesses, but contended that the plaintiff had not made out any case against her, and, after argument, the learned Judge reserved his judgment for further consideration of the law upon the questions raised, and on the 14th of May gave judgment in these words: "Judgment for plaintiff for \$132.05 and costs: to be paid in fourteen days.

"*Allen v. Edinburgh Life Assurance Co.* establishes that the right of a woman to dower may be taken in execution."

The defendant applied for a new trial, the grounds for her application being as follows:

"1st. Because there was no evidence of presentment or dishonour of note in question; or of notice to the said defendant of any presentment and dishonour of it.

"2nd. Because the said defendant was proven to be a married woman, and there was no evidence of her having separate estate.

"3rd. Because it was proven that the said defendant did not intend to, and did not contract in respect of, or so as to create a charge upon any separate estate.

"4th. Because the said note having been indorsed by the said defendant without any value or consideration, and being entirely an accommodation indorsement, and the note having been given for a debt payable by the maker of the said note to the plaintiff, in which debt the said defendant had no interest whatever, the said defendant being a married woman, could in no case be liable for its payment.

"5th. Because the said defendant's right to dower, referred to in the evidence, if it ever existed, had been extinguished long before the indorsement of the said note, and does not now exist: *Laidlaw v. Jukes*, 27 Gr. 101.

"6th. Because the said judgment is contrary to law and evidence."

The plaintiff opposed the application, and put in with his objections an affidavit setting out that it appeared from the books in the Registry Office of the County of Middlesex, that the defendant had acquired from one of

her children a conveyance of that child's interest in the estate of defendant Morcombe's late husband, who died in the year 1866, and was entitled to that in addition to her right of dower.

The learned Judge refused to grant a new trial, observing :

" 1st. As to the first ground for a new trial, no question was made at the trial as to notice, &c.

" 2nd. I think there was evidence of separate estate, as to which I refer to *Allen v. Edinburgh Life Assurance Co.*, 25 Gr. 306.

" 3rd. When she made a contract it was to be presumed that she contracted in reference to her estate.

" 4th. I do not think the fourth ground valid.

" 5th. I do not see that the right to dower is extinguished. By 43 Vict. ch. 14, the right to dower would only cease after the lapse of ten years from the time the possession of the dowress ceased. For all these reasons I must refuse a new trial. I do so the more willingly as I look on the defence as dishonest."

The defendant thereupon, pursuant to the provisions of "The Division Court Act, 1880," appealed against the said judgment to this Court upon the grounds:

" 1. That the judgment should have been in favour of the defendant Morcombe; as no evidence of presentment or dishonor of the note in question, or of notice to the said defendant of any presentment and dishonour of it was adduced at the trial.

" 2. And, as the said defendant was at the said trial proven to be a married woman, and there was no evidence of her having separate estate.

" 3. And, as it was likewise proven, that the said defendant did not intend to, and did not, contract in respect of, or so as to create a charge upon any separate estate.

" 4. And, as it was likewise proven, that the said note was indorsed by the said defendant without any value or consideration and was entirely an accommodation indorsement; and that it was given for a debt payable by the maker in which the said defendant had no interest whatsoever, the said defendant, being a married woman, could in no case be liable for its payment, and,

" 5. Because the said defendant's right to dower referred to in the evidence, if it ever existed, had been extinguished long before the indorsement of the said note and does not now exist: *Laidlaw v. Jackes*, 27 Gr. 101.

" 6. And, because the said judgment is contrary to law and evidence, and ought to have been set aside, and judgment for the said defendant entered in the said Division Court, upon the said defendant's application therefor."

The appeal came to be heard before Spragge, C. J. O., on the 17th of April, 1883.

R. M. Meredith, for appellant. The affidavits presented to oppose the application for new trial, were inadmissible, and ought not to have been received. It is only where an application is made upon affidavit, that affidavits can be used to oppose it. The applicant has no notice whatever of the material used in opposing an application; the papers are not required to be served upon the opposite party, but are sent to the Judge only. So that here the applicant did not even know that any affidavit had been filed until after her application was refused. If an opportunity were given her she could shew clearly that the statements made as to her owning any share or interest in the lands in question are entirely erroneous, and that she never had any estate or interest in any lands except her right to dower.

There was no evidence of the dishonour of the promissory note, nor of notice of dishonour to the appellant, who was merely an accommodation indorser. The note was not filed in the Court below, nor is it sent up with the papers and no other papers than those certified by the Clerk (sec. 20 of the act) should be used upon the appeal. *Siddall v. Gibson* 17 U. C. R. 98. The onus was upon the plaintiff of proving separate estate within "The Married Woman's Property Act." This he failed to do, and therefore should have been nonsuited. But the main point is, that the appellant's right of dower in her former husband's estate was clearly barred by the Statute of Limi-

tations, her dower not having been assigned nor any action brought to enforce her claim within ten years after the death of her said husband. The learned Judge of the County Court appears to have admitted this, but to have supposed her right was saved by the Act of 1880 (43 Vict. ch. 14, sec. 3 (O), overlooking the fact that the Act is expressly limited to cases where the right of action had not ceased before the passing of the Act. It had ceased in this case two years before that. The right of action had ceased four before the act was passed.

C. H. Ferguson, for the respondent. We now produce the note and protest, which must have been produced in the Division Court, but not filed or left with the Clerk. The plaintiff's solicitor probably retained them, and now produces them and the Court can receive them as evidence, although not certified under the Act.

There is no evidence that the appellant is a married woman. [SPRAGGE, C. J.—Did not the whole case proceed on the assumption that she was? The Judge's notes are meagre, but the case must have gone wholly upon that fact having been proven or admitted.]

The defendant Morcombe had, upon her own evidence, separate estate—her dower in her former husband's farm. It is true that he died more than ten years before this debt was contracted, and before the passing of the Act of 1880, but she was in possession, and in receipt of rents and profits, and that is sufficient. *Cameron* on Dower page 495; *Allen v. Edinburgh Life Assurance Company*, 19 Gr. 248; *S. C.*, 25 Gr. 306. Besides she had other real estate as shewn in the affidavits filed on the application for new trial.

Meredith, in reply. It was both admitted and proved at the trial that plaintiff married again before the time of indorsing the note in question. At the trial the plaintiff accepted the *onus* of proving separate estate, and called the appellant herself to prove it. The Judge's notes, however, do not contain any more of the evidence than the judge seems to have thought material for *his* further consideration of the questions raised at the trial.

The case of *Laidlaw v. Jackes*, 27 Gr. 101, is conclusive in the appellant's favor upon the main point.

In any case there should be a new trial.

December 12th, 1883. SPRAGGE, C. J. O.—The defence by the defendant Jane Morcombe is, that she was a married woman. In her evidence she says that she signed the note produced; that her son, the other defendant, asked her to do it. The note with protest was produced at the trial as appears by the affidavit of the plaintiff's solicitor.

An application was made for a new trial on the ground *inter alia* of want of notice of dishonor of the note. There appears to be no ground for such objection as the production of the protest is made by the statute *prima facie* evidence of presentation and notice. No objection on this score was taken at the trial.

It was further objected on the application for new trial that the defendant's was an accommodation indorsement, and that she being a married woman, it was not binding upon her, as I understood the objection, even though she had separate estate.

I think neither of these objections tenable.

The defence is wholly unmeritorious, and the defendant should, I think, be held bound by the proof that she has made. In her evidence given at the trial, she did not state that she was a married woman, when she signed the note, or that she was so when she gave her evidence; nor is the fact proved otherwise. That was a fact necessary to be proved, so far as her defence rested upon anything, except the first objection, that of want of notice.

Against her application for new trial it is stated upon affidavit that she has been in possession, or in receipt of the rents of fifty acres of land for about sixteen years, that land having been the property of a former husband, and that she is still receiving the rents of that property; and that statement is not denied. In relation to that property, she says in her evidence: "My husband made no will; I have only a right of dower not set apart; have been living on

it; my children have been living with me; have seven; have one living with me."

She, therefore, rests her defence upon the circumstance of the dower to which she was entitled not having been set apart. If she had chosen to have her dower set apart she would have received one-third, not choosing to do so, she has received the rents and profits of the whole; and for all that appears her possession may have extinguished the rights of the heirs of her husband.

I do not desire upon this appeal, unnecessarily, to decide questions of some nicety which were raised before the County Court Judge, sitting as a Division Court Judge, and which have not been argued before me so fully as the same questions would probably have been argued if the appeal had been from one of the Superior Courts.

The learned Judge might well refuse a new trial upon the material before him not assuming anything in favour of the defendant, or granting any indulgence in the way of supplementing the evidence on her behalf. He says rightly, I think, "I look on the defence as dishonest."

The Division Court Acts down to the present day give a large discretion to the presiding Judge. The Act in the Revised Statutes continues the use of the same language as is contained in previous Acts, that the Judge in determining the questions of law and fact before him, "may make such orders, judgments, or decrees thereupon as appear to him just and agreeable to equity and good conscience," and subsequent Acts have made no change in that respect.

I do not see that the Judge was wrong upon the material before him in refusing the application for a new trial.

The appeal is, therefore, dismissed, with costs.

FAULDS ET AL. V. HARPER ET AL.

Mortgage—Statute of Limitations—Equity of redemption.

Held, reversing the judgment of the Court below (2 O. R. 405), that the disability clauses of the Real Property Limitation Act do not apply to actions of redemption, and therefore in this case all the mortgagees were barred [SPRAGGE, C. J. O. dissenting] but,

Semble, if it were otherwise the decree of BLACKBURN, V. C., adjudging that the titles of those tenants in common against whom the statutory period of limitation had run were barred, while the title of those against whom the time had not run were not barred, was right.

It appeared that the mortgagee took proceedings for sale, and one H. bought under the decree, and was declared the purchaser, by the report on sale. The mortgagee was in reality the purchaser, having procured H. to bid at the sale.

Per SPRAGGE, C. J. O.—The sale to the mortgagee was a fraud upon the plaintiffs, and they had not disentitled themselves to relief by delay, as for all that appeared the real facts as to the purchase were unknown to them until just before the filing of the bill.

Per BURTON, J. A.—An action to redeem a mortgage is not an action to recover land, within the meaning of the Real Property Limitation Act.

THIS was an appeal by the defendant Margaret Harper, from a judgment delivered on June 22nd, 1882, by the Divisional Court of the Chancery Division, reported 2 O. R. 405.

The bill in the Court below was filed on the 27th of February, 1880, by Elijah Washington Faulds, William Martin Faulds, James Linda Faulds, Wesley Bell Faulds, and Matilda Elizabeth Faulds, against Margaret Harper, James C. Lane, and Joseph Harper, praying under the circumstances therein stated, and which, sufficiently appear in the report of the case in the Court below, redemption of the mortgaged premises in the pleadings mentioned.

In order to a more ready understanding of the circumstances the following statement of dates and facts connected with the transactions in question was given in the appeal case.

The original mortgage from William Faulds to Andrew Faulds was made on 29th April, 1857, to secure \$1900 and interest.

William Faulds died 1st July, 1858, in possession of the mortgaged premises, intestate and leaving his widow Matilda, who is still living, and six children, viz.: Elijah Washington Faulds, born in the year 1844; James Linda Faulds, born 22nd April, 1848; Eliza Faulds, born 1850, died unmarried in April, 1868; William Martin Faulds, born 23rd May, 1852; Wesley Bell Faulds, born 24th February, 1855; Matilda Elizabeth Faulds, born 24th November, 1857.

After the death of the mortgagor, Andrew Faulds filed the bill in *Faulds v. Faulds*, and obtained a decree for sale on 26th June, 1861. The sale took place on 12th April, 1862, when Joseph Harper bid for and was declared the purchaser of the mortgaged premises. The Master's report on sale was made on May 6th, 1862, and filed 26th May, 1862. On 14th June, 1862, Andrew Faulds entered into possession.

On 16th June, 1862, Andrew Faulds conveyed to Joseph Harper, who re-conveyed to him on the same day.

On 29th December, 1879, the sale to James C. Lane by the executors of Andrew Faulds took place, and the mortgage back by him to Margaret Harper was made.

The appeal came on to be argued before this Court on the 16th March. 1883. *

Street, for the appellant. The sale to Joseph Harper was voidable not void even upon the respondent's own shewing, and has been confirmed by their laches and delay and they are barred of relief by their delay, and are bound by the Master's report on sale in *Faulds v. Faulds*. That report as a matter of evidence, should have been taken as conclusive against the respondents, or at all events as sufficient under the circumstances proved at the hearing to outweigh the evidence given on the part of the respondents.

Whittaker v. Jackson, 2 H. & C. 926; *Nichols v. McDonald*, 6 Gr. 594; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Hughes*, 6 Ves. 617.

Andrew Faulds entered into possession on the 14th June, 1862, and no acknowledgment in writing of the right of the respondents or of any other persons to redeem was ever given by him or any other person entitled; consequently the respondent's right to bring an action or suit to redeem the mortgage was finally barred on 1st July. 1876, by the operation of "The Real Property Limitations Amendment Act, 1874," afterwards consolidated with R. S. O. ch. 108.

The saving for disabilities provided by the 5th and 6th sections of that Act does not apply in actions or suits for the redemption of mortgages: *Kinsman v. Rouse*, 17 Ch.

* *Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

D. 104; *Forster v. Patterson*, 17 Ch. D. 132; *Harlock v. Ashberry*, 18 Ch. D. 229, S. C. 19 Ch. D. 539; *Heath v. Pugh*, 6 Q. B. D. 345, S. C. 7 App. Ca. 235. It is true the case of *Hall v. Caldwell*, 7 U. C. L. J. 42, differs from some of these authorities, but that case is not now binding upon this Court because the statute upon which it was based has been altered by "The Real Property Limitations Act, 1874," and by the R. S. O. ch. 108.

But even if the disability clauses of the R. S. O. ch. 108, and the Acts consolidated thereby should be held to apply to actions and suits for the redemption of mortgages, the respondents other than Wesley Bell Faulds and Matilda Elizabeth Faulds are barred because they attained the age of 21 years upwards of five years before the filing of the bill: R. S. O. ch. 108 sec. 4; sub-sec. 1 of sec. 5, secs. 11, 15, 19, 43 and 45; *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, 17 Ch. D. 132; *Culley v. Doe dem Taylerson*, 11 A. & E. 1008; *Woodruffe v. Doe dem Daniell*, 15 M. & W. 769; *Dawkins v. Lord Penryhn*, 6 Ch. D. 318; *Asher v. Whitlock*, L. R. 1 Q. B. 1. The two last named respondents, therefore if entitled to any portion of the proceeds of the sale to Lane are entitled at most to one-sixth and not to one-fifth after payment of the balance remaining due upon the original mortgage, because the share of Eliza Jane was barred before the filing of the bill under sec. 4, and sub-sec. 1 of sec. 5 of R. S. O. ch. 108, and the rights of the persons claiming under her are not extended by the disability clauses secs. 43-45. The rights of the widow of William Faulds, whether as dowress or by descent from Eliza Jane, are also wholly barred.

Gibbons, for the respondents. The evidence is conclusive that there was no sale of the lands; the mortgagee merely bought in the land for his own benefit and the sale was void, the mortgagee having no right to purchase. *Hall v. Caldwell*, referred to by the other side, is binding on this Court and should be followed. The plaintiffs having a right to redeem, it clearly follows that they have the right to an account of the dealings of the mortgagee with the lands, and of the proceeds thereof received by him.

It was also contended that the right of redemption being indivisible, the mortgagee could not be compelled to accept a portion of the money due on his mortgage and to convey merely one-sixth, and on the same principle if one can redeem, the redemption must be as to the whole.

March 28th, 1884. SPRAGGE, C. J. O.—This case has been treated in the Court below, and in the argument in appeal as a case of mortgagee in possession, and of the application of the Statute of Limitations to such a case upon the mortgagor coming to redeem.

I incline to think that this is not a correct view of the case. There was a mortgage in this case from William Faulds under whom the plaintiffs claim, to his father Andrew Faulds, under whom the appellant Margaret Harper claims; and there was default after the death of the mortgagor in payment of the mortgage money; but the mortgagee did not enter into possession of the mortgaged premises upon such default, or at any time afterwards, in virtue of his character of mortgagee.

He instituted a suit against the heirs and widow of the mortgagor in order to realize his mortgage debt, and prayed for a sale. The usual proceedings appear to have been taken; and upon default in payment the mortgaged premises were sold under the direction of the Master, who reported Joseph Harper to be the purchaser. The report is dated 26th May, 1862. On the 16th June, in the same year, Andrew Faulds conveyed to Joseph Harper, and on the same day Harper re-conveyed to him, and at or about that time Andrew Faulds entered into possession, the possession previously to that time having been in the widow and children of William Faulds.

Andrew Faulds never was in possession in any other character than that of purchaser. Consistently with that character he could not receive any payment on account of the mortgage debt, for, according to his position the debt was extinguished, the sum bid by Harper being the amount of it; and for the same reason he could not give such acknowledgment in writing as to the right of the mort-

gagor as is contemplated by the statute. It cannot therefore lie in his mouth to say that he was in possession as mortgagee, and he cannot invoke the Statute of Limitations as extinguishing the title of the plaintiffs by reason of his possession in that character.

I do not understand Mr. Street to contend that the judgment of the Court below was erroneous in adjudging the mortgagee himself to have been the real purchaser at the sale of the mortgaged premises, as a matter of fact; though contending that the Master's report of the sale to Harper, confirmed by the Court, was conclusive of Harper being the purchaser, and that his being the purchaser is not open to question. In that I cannot agree. I have no doubt that the plaintiffs were not concluded by the report from shewing that Harper was the agent of the mortgagee in making the purchase, and that the mortgagee himself was the real purchaser. The learned Judge before whom the case was heard so found, and there was in my opinion sufficient evidence to warrant his so finding.

It is scarcely made a question that this purchase—the mortgagee purchasing at this sale, he having the conduct of the sale—was open to impeachment; that the mortgagee was in the eye of the law a trustee for sale and could not purchase, that in the words of Mr. Lewin, 6 ed. p. 422, he was absolutely and entirely disabled from purchasing.

His position upon becoming such purchaser is material. If his purchase was simply void, he would, I apprehend, still be mortgagee, and his possession that of a mortgagee in possession. But I take the better opinion to be that such a purchase is voidable only, not void. It is true that in *Popham v. Exham*, 10 Ir. Ch. 440, the Master of the Rolls said that the authorities would appear to establish that in such a case the sale is not simply impeachable for undervalue, (a phrase not quite accurate I may remark), but is actually void, and he refers to the observations of Lord Cottenham in the case of *In re Bloye's trusts*, 1 McN. & G. 495, 6, 7. Lord Cottenham, however, in the passages

referred to, only says that such a transaction cannot for a moment be sustained in a Court of Equity; and he proposed to declare that the deed impeached was a deed which the Court could not act upon, and which ought to be set aside.

I have referred to a number of the older cases. I find language used by Lord Eldon, Sir Wm. Grant, Lord Alvanley, and others, similar to that of Lord Cottenham which I have quoted; but I do not find in any of them that such transactions have been designated as void, nor have I found them declared to be so in any minutes of decree. The language of the learned Judges imports rather that they are voidable only, not that they are void. The cases are collected in Mr. Lewin's book, under the head "purchases by trustees."

In some American cases the question arose whether such purchases were void or voidable. In *Prevost v. Gratz*, 1 Peters, 367, Judge Washington, after observing that nothing can be more just than the principles which govern a Court of Equity in relation to purchases made by the trustees of the trust property, says: "The purchase, however, by the trustee is not absolutely void, but voidable at the election of the *cestui que trust*, if he is dissatisfied with it, and in a reasonable time after knowledge of the fact impeaches its validity." *Harrington v. Brown*, 5 Pick. 519, is to the same point.

Then as to the rule, which prevails in England as well as in this country and the United States, that a party impeaching such a sale must do so in a reasonable time. What is reasonable time must depend upon the circumstances of each case.

There is, to begin with, this rule of fairness and common sense, that when the purchase has been made under circumstances of disguise and concealment, it will be open to impeachment for a longer period than where it has been made openly. This rule was acted upon by Sir John Leach, in *Watson v. Tone*, 6 Mad. 153, upon a bill filed three years after the plaintiff came of age; and in a case

where there was the evidence of the father (who was dead) having had knowledge of the real transaction. Sir John Leach said: "If an executor ignorant of the rule of this Court openly purchased assets of his testator with the full approbation of the parties then presently interested, the Court would not in that case press the equitable rule against him after such a length of time. But in this case the transaction was concealed and disguised in a manner which imported fraudulent intentions; and, admitting the father to have been acquainted with the real circumstances his knowledge and approbation of the transaction cannot conclude either the mother or the son."

In this class of cases, the rule is that time does not count against parties who are not *sui juris* as *femes covert* and infants. Mr. Lewin so states the rule. One of the cases to which he refers was twice before the Court; in the first instance before Lord Alvanley. When the bill was filed the plaintiffs were still infants, Lord Alvanley said, 5 Ves. 682: "If *cestuis que trust* should come after a great length of time, finding it a gaining bargain, I should dismiss the bill. But in this case they are infants still." Seven years later the case was before Lord Eldon, 13 Ves. 601. After observing upon the circumstances under which a trustee may enter into a contract with his *cestuis que trust*, his Lordship observed, "But in this case the trustee could not enter into such a contract, as the *cestuis que trust* were infants, and it would be most dangerous to hold that a trustee to sell for the benefit of infants, bound to exert all his skill, and apply all his knowledge with strict integrity for their benefit, may exert that skill and use that knowledge for his own advantage." The case afforded a good illustration of the value of the rule. Lord Alvanley when the case was before him, was much impressed with what appeared to him to be the entire fairness of the transaction as to price and otherwise. He directed an inquiry whether it would be for the advantage of the infants that the property should be resold. They were resold, and it appeared before Lord Eldon, and he com-

mented upon the fact that the purchase by the trustees had been at a great undervalue. In *Roche v. O'Brien*, 1 B & B. 330, there had been great delay. The original transaction had occurred in 1770, having been entered into by the plaintiff's father. The plaintiff came of age in 1792, and the cause was heard in 1808. I refer to this passage in the judgment of Lord Manvers. "At this time the plaintiff was a minor, and no act of his could be binding until he attained his age of 21."

There is further the general rule that laches is not to be imputed at an earlier date than the discovery of that which constitutes the cause of action. Mr. Lewin applies it to the case of purchases of trust property thus: "For laches to operate as a bar, it must be shown that the *cestui que trust* knew the trustee was a purchaser, for while the *cestui que trust* continues ignorant of the fact he cannot be blamed for not having quarrelled with the sale."

In *Randal v. Errington* 10 Ves. 423, there was a mortgage followed by a conveyance of the mortgaged premises, and other property in trust to sell and pay the mortgage and other debts.

There was a sale at which the original mortgagee was the purchaser. Upon bill filed some twelve years after the purchase, to set it aside on that ground, delay and acquiescence were relied upon by the defendant. Upon that Sir William Grant said, "But the length of time that has elapsed is objected. Acquiescence may have the same effect as original agreement, and may bar such a remedy as this. But the question as to acquiescence cannot arise, until it is previously ascertained that the *cestui que trust* knew his trustee had become the purchaser, for while the *cestui que trust* continued ignorant of that fact, there was no laches in not quarrelling with the sale upon that special ground."

Upon the part of Errington, the trustee, therefore, distinct and explicit information was necessary, that the original purpose having failed he had taken the estate to himself, and meant to keep it at that price. The "original purpose," is not material to the point in question.

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In the case before us I do not find, upon looking over the evidence that the plaintiffs knew, or that any of them knew, that the mortgagee was the real purchaser of the land. The fact was concealed, and the appellant and others claiming under the mortgagee, appear always to have maintained that the fact was otherwise, and that Harper was the real as well as the nominal purchaser.

For all that appears the real facts as to the purchase were unknown to the plaintiffs until just before the filing of the bill.

Mr. Lewin says: "A sale cannot generally be set aside after a lapse of twenty years." He adds—I have no doubt, correctly—"But in these cases the Court does not confine itself to that period by analogy to the Statute of Limitations, for relief has been refused after an acquiescence of eighteen years, and seventeen years; and it is presumed that even a shorter period would be a bar to the remedy when the *cestui que trust* could offer no excuse for his laches."

If this case falls within the class in which I have placed it, the Statute of Limitations is out of the question, and the plaintiffs are entitled to relief, unless they have disentitled themselves by laches or acquiescence. In my opinion they have in no way disentitled themselves to relief. I think their title to relief is clear, upon the several grounds that I have indicated, and the relief would be substantially the same as upon a bill filed against a mortgagee in possession.

In saying that the case had been treated in argument as well as in the judgment of the Court below as a case of mortgagee in possession, I should have said that Mr. Street did argue that the sale was not void, but voidable only, and that the plaintiffs were disentitled by their laches apart from the Statute of Limitations, and that the mortgagee, and those claiming under him, were not in the position of mortgagees in possession until declared to be so. He did not, however, pursue the subject further, but

argued upon the construction of the Statute of Limitations and the disability clauses.

Taking the view that I do of this case, and of the class to which in my judgment it belongs, I have not thought it necessary to consider the questions discussed in the judgments of the learned Judges before whom the case was argued in the Court below.

I need only say that I desire not to be considered as dissenting from their judgments, if this were a case of mortgagee in possession, and of the plaintiffs coming to redeem after a certain lapse of time.

BURTON, J. A.,—It would, I think, be very unsafe to treat this case otherwise than it was dealt with on the argument, and by the Judges in the Court below, purely as a case of mortgagee in possession, and the heirs of the mortgagor coming to redeem.

No case such as is suggested by the learned Chief Justice is raised or suggested by the pleadings; nor was such an issue raised in the reasons of appeal, nor brought forward on the argument, and although there may be some evidence tending to support such a case as he suggests, it is quite impossible to conjecture what further evidence might have been forthcoming, if such an issue had been distinctly raised upon the pleadings.

To sustain such a case it would have been incumbent upon the plaintiffs to have shewn a designed concealment of important facts, and to have satisfied the Court that with due diligence the fraud could not have been detected. If the fraud, though concealed, could have been discovered earlier with proper diligence, this exception in the Statute would not apply.

The scheme of purchasing the land in a third person's name was resorted to, no doubt, advisedly because the mortgagee was aware that he could not make a valid purchase in his own name, but the conveyance to that pseudo purchaser, and the reconveyance to himself on the same day, they do not appear to have made any secret of, and the possession

followed upon the execution of that reconveyance. These were all matters of which the family of the mortgagor had the means of knowledge, and there is no evidence that they did not know them, whereas there is an entire absence of evidence of any attempt to conceal the facts from them.

I confess that the inclination of my own mind is that the action should have been dismissed upon the ground that there is no saving of disabilities for a mortgagor, or his heirs, or assigns, and therefore that the right to redeem had gone absolutely, and I should have thought that construction of the Statute to be clear, but for the judgment of the Court of Error and Appeal under the former statute, 4th Wm. IV. c. 1, in *Hall v. Caldwell*, which for some reason has never found its way into the regular reports. It is said that that action was commenced before the consolidation of the Statutes, but however that may be, the decision was not given until some years after the consolidation, and chap. 88 of those Statutes seems to have been relied on as governing the case. I refer to this because under the original act the disability clauses are to be found immediately after those clauses which refer to the making of an entry, or distress, or bringing an action to recover any land or rent, and are numbered respectively, 28, 29, and 30, whilst the section dealing with the right to redeem when the mortgagee has gone into possession is to be found in a later part of the enactment, s. 36, and no reference whatever is made in that, to the disability clauses. In consolidating the statutes, the disability clauses are to be found at the end of the Act, and this arrangement would seem at the first blush to favour the contention that the legislature intended to extend their operation to all cases in which a period of limitation had been previously provided; but it appears to me that there are two answers to that contention—one, that the consolidated statute was not to be held to operate as a new law, the other that the language is confined as before to the making an entry, or distress, or bringing an action to recover any land or rent.

Whereas, that used in the 36th section, (21 of the Consolidated) is not a suit to recover any land or rent, but a suit to redeem.

When the Legislature dealt with other suits in equity, to recover land or rent, they provided (sec. 31) that no person claiming the same in equity should bring any suit to recover the same, but within the period during which by virtue of the provisions thereinbefore contained, he might make an entry or distress, or bring an action to recover the same if he had been entitled at law to such estate interest, or right in or to the same as he claimed therein in equity.

If we were dealing with a case under the Consolidated Statute, cap. 88, we might feel bound to follow the decision in *Hall v. Caldwell*, but it does not seem to me to follow that that is a binding authority under the Act of 1874, the present statute regulating the limitation of actions regarding real estate.

The original Act before revision was prefaced by a recital to the effect that it was expedient to lessen the time for making entries and distresses, and for bringing actions and suits to recover land, and also to lessen the time for redemption by mortgagors, drawing a distinction between an ordinary suit for the recovery of land, and a suit to redeem, if such a suit can be said to be a suit for the recovery of land, and then by the first section declared that no such action should be brought but within ten years after the right of action accrued.

Sections 2, 3, and 4, define when the right in certain specified cases shall be deemed to have first accrued. And then follows the disability clause, which provides that if, at the time which the right of any person to make an entry or distress, or to bring any action to recover any rent, shall have first accrued, such person shall have been under any of the disabilities mentioned, including infancy, then such person, or any person claiming through him, may, notwithstanding the expiration of the statutory period before mentioned, make such entry or distress, or bring such

suit, within a further period from the time when such disability ceased.

This is followed by the section relating to mortgagees in possession, and in such cases it is declared that a mortgagor shall not bring an action or suit to redeem, but within ten years after the time at which the mortgagee obtained such possession.

The disabilities clauses of the Consolidated Statutes were repealed, and s. 16 provides that the Act shall take effect and come into force on the 1st. of July, 1877, as respects any person who at the time of the passing of the Act resided out of the province, and who was entitled to make an entry or distress, or to bring any action or suit, to recover any land or rent, *or who was a mortgagor or person entitled to redeem within the meaning of the 21st and three subsequent sections of the Consolidated Statute,* and certain other parties named, and except as respects such persons the act was to take effect on the 1st July, 1876.

I draw attention to the marked distinction throughout the Statute between ordinary actions, or suits to recover land at law, or in equity, and a suit to redeem; a distinction which we are not in my opinion at liberty to disregard, even though a suit to redeem may be in a sense a suit to recover land.

Section 5 of the Act of 1874, also grants the extension in the cases specified notwithstanding that the period of ten years *hereinbefore mentioned*, that is in the four previous sections limited, not by *this Act limited*, had expired. This is the Statute which must regulate the rights of the parties to this suit, as their rights had become fixed before the revision; for strangely enough the same arrangement has been made in the Revised Statute as in the Consolidated Statutes, and the disability clause placed at the end of the Statute.

Having regard therefore to the recitals, to the fact that the disability clauses follow the sections which relate to actions or suits expressed *eo nomine* to be for the recovery

of land, and to extend the period of limitations referred to in those preceding sections only, and not generally to the periods of limitation referred to in other parts of the act, I must confess that the importing of these words into the sections relating to mortgages, would to my mind bear more the appearance of legislation than interpretation.

If it were permissible to speculate, which I think it is not, as to the policy or intention of the Legislature in shortening the period of limitation in respect to mortgagees in possession, it would not be difficult to imagine reasons of more or less cogency—the liability to account for rents, the avoidance of long and intricate accounts, and the risks as to re-imbursment for improvements, are prominent among them, but I would place my decision on the short ground that when a Court undertakes to read one clause of an Act of Parliament into another where no express reference is made in one of those clauses to the other, it incurs a very great risk of making a law which the Legislature never intended.

Lord St. Leonards, than whom no greater master of real estate law existed in his day, when speaking of these clauses not applying to mortgagors under the English Act, treats it as clear in his treatise on the real property Statutes, in these words: “There is it should be observed, no saving for disabilities of the mortgagor or his heirs, in regard to the bar created by s. 28.”

If I am wrong in holding that under the words of our statute an action to redeem is not properly speaking, “an action to recover land” within the previous section of the statute, I am content to err in such good company as the late Master of the Rolls who so held in *Kinsman v. Rouse*, 17 Ch. Div. 107, where he held that those sections evidently referred to cases of ordinary ownership, where the rightful owner of land has been dispossessed, and that it was not intended to put the rights of the mortgagee upon the same footing as the rights of persons claiming under an ordinary dispossession of land.

I think therefore that the claim of the plaintiffs was

barred and that the bill should have been dismissed, but if it is to be treated as an action for the recovery of land, or to speak more accurately if the right to the proceeds is to be regulated in the same manner as if an action were brought for the recovery of the land itself, it seems to follow that the rights of the three elder children to bring an action ceased at the expiration of five years from their attaining their majority, and the decision of Blake, V. C., holding them barred, would seem to be correct.

If the remaining two are not barred, then it was admitted at the hearing that each would be entitled to one-sixth not one-fifth as provided in the decree.

I am however of opinion for the reasons stated that the statute had run against all of them before this suit was instituted.

The appeal should be allowed, and the bill dismissed with costs.

PATTERSON, J. A.,—The plaintiffs pray that it may be declared that Andrew Faulds, through whom the defendants claim, always had the lands as mortgagee, and in no other way, and that they may be allowed to redeem.

The fact is found, and I do not doubt the correctness of the finding, that Andrew Faulds was himself the purchaser at the sale under his own decree, although it was nominally a sale to Joseph Harper, and that Andrew was therefore still mortgagee.

Possession was taken by Andrew after the sale, and seventeen years before this action.

The plaintiffs were all infants when possession was taken, and they were all of age when this action was brought, and all but two of them, namely, Wesley and Matilda Faulds, had been of age for over five years.

The decree made by Vice Chancellor Blake at the trial, declared three of the five plaintiffs barred by the statute of limitations, and that all their right and title to the proceeds of the sale of the lands to the defendant Lane are now vested in the defendant Margaret Harper; and

declared in favour of the other two plaintiffs, Wesley and Matilda.

On the re-hearing before Proudfoot and Ferguson, JJ., it was held, as it had been held at the hearing, that the two plaintiffs Wesley and Matilda were not barred by the statute; but it was also held that some of the plaintiffs having a right to redeem, all the plaintiffs ought to succeed in this action; and the decree was varied accordingly.

Mrs. Harper, the defendant, appeals, and Mr. Street has argued on her behalf, that there is no saving for disabilities of a mortgagor or his heirs, but that the ten years' possession of the mortgagee forms an absolute bar.

I am of opinion that that contention is supported by the Statute 38 Vict. ch. 16, which is the law applicable to this action.

If this opinion should be incorrect, and if we should be called upon to decide as between the original decree and that pronounced on the re-hearing, I think we ought to pronounce in favour of the former. I shall give my reasons for this, but I shall first say what I have to say on the larger question.

It will be convenient to consider briefly how the matter stands under the English law, which is the model to which our legislation has looked, and then to discuss our own statutes.

Under the Imperial Act, 3 & 4 Wm. IV. ch. 27, which was followed in framing our Statute 4 Wm. IV. ch. 1, no occasion appears to have arisen in any reported case for placing a decisive judicial construction upon the clauses which affect this question.

Lord St. Leonards, in his treatise on the Real Property Statutes, called attention to the circumstance that there was no saving for disabilities on the part of the mortgagor or his heirs provided by the 28th section of the statute, which fixed the limitation: Sugd. R. P. St. p. 118; but in several text writers it was intimated that the better opinion was that as they were saved under the former state of the law, in which the Court of Chancery adopted the

periods which governed real actions under 21 Jas.1 ch.16. ss. 1 & 2, and as a redemption suit was looked upon as a suit to recover land or rent under section 24, the saving of disabilities would still be applicable. This suggestion may be found in *Fisher on Mortgages*, at p. 95 of the first edition, and repeated in subsequent editions; in Coote on Mortgages at p. 936, of the 4th edition, and in Banning on Limitations at p. 179. On the other hand, Messrs Darby and Bosanquet, at p. 367 of their treatise, adhere to the view of Lord St. Leonards, Sugd. R. P. Stats., p. 118. The point has however arisen since the passing of the new Limitation Act, 37 & 38 Vict. ch. 57, and it has been decided by Sir George Jessel, M. R., in *Kinsman v. Rouse* 17 Ch. D. 104, and by Sir James Bacon, V.C., in *Forster v. Patterson*, 17 Ch. D. 132, that neither under the new statute nor under the earlier one, did the disability clauses apply to actions to redeem a mortgagee in possession.

I therefore take the law of England to be adverse to the maintenance of an action in circumstances like the present.

All the reasons given for the decisions I have just alluded to are as fully applicable to our Provincial Acts 4 Wm. IV. ch. 1, passed in 1834, and 38 Vict. ch. 16, passed in 1874, if we had nothing but those Acts themselves to consider, as they were to the corresponding Imperial Statutes.

But we have along with these statutes to take account of the consolidation of the statutes in 1859, and the decision in the following year, of the case of *Hall v. Caldwell*.

Let us first refer to the statutes. In that of 1834, the 28th section provided for the extension of time to make an entry or distress or bring an action to recover land or rent, in cases where the action first accrued "as aforesaid" the disability existed. These words, "as aforesaid," referred to the preceding twenty-seven clauses, none of which dealt with the redemption of mortgages, which was the subject of section 36. Our sections 28 and 36 correspond respectively with the sections 16 and 28 of the Imperial Act of 1833. Referring to them, the Master of the Rolls uses the language

read by my brother Burton from the judgment in *Kinsman v. Rouse*, distinguishing the case of mortgagee in possession from that of an ordinary dispossession of land, which is that for which the early clauses provide.

The reports contain the word "disposition," but that I take to be substituted for "dispossession," probably by a misreading of a short hand note.

The plain effect of the language seems to me sufficient to forbid the application of the term "action or suit to recover land or rent" as used in our section 28, with evident reference to proceedings described in the same words in preceding sections, to the proceeding for redemption which is spoken of in very different language in section 36; and that understanding is supported by the order in which the clauses stand in the statute, which, as remarked by the Vice-Chancellor, in *Forster v. Patterson*, deserves attention.

But this order was changed in consolidating the Statute in 1859. In C. S. U. C., ch. 88, section 28 became sec. 45 and followed the mortgage clauses, the clauses relating to disabilities being grouped together at the end of the statute. The language moreover was slightly changed. Where section 28 spoke of the right to make an entry &c., having first accrued "as aforesaid," the words "hereinbefore mentioned," were substituted in section 45 for the words, "as aforesaid."

The phrases are no doubt almost equivalents, but the change was capable of being understood to indicate that the new form of expression was adopted advisedly, and with the intention of referring to all that, in that consolidated statute, preceded section 45.

This was the position of the law when *Hall v. Caldwell* was decided. That was a suit for the redemption of a mortgage, the mortgagee having been long in possession, and the plaintiff having been an infant until three or four years before he filed his bill. The questions were raised by demurrer to the bill, and that which was treated as the most important one was in connection with the Dormant Equities Act, which does not at present concern us. The

demurrer was argued before Vice Chancellor Esten, whose judgment is reported in 6 U. C. L. J. 142. He decided the Dormant Equities point against the defendant, and held that the Statute of Limitations obviously interposed no bar to the action, because possession had been taken within twenty years before action. The case in appeal is twice reported, first in the 7th volume of the Law Journal at p. 42, by Mr. Hodgins, who gives the substance of judgments delivered by Sir J. B. Robinson, C. J., and by Esten, V. C., and afterwards in the 8th volume at p. 93, by Mr. Grant, reporter to the Court, who gives the judgment of Sir J. B. Robinson at greater length, and as the judgment of the Court, making no reference to any utterance of other members of the Court. The decision, of Esten, V. C., was affirmed, but it was not assumed, as it had been in the Court of first instance, that the suit had been brought within 20 years, while at the same time it was not held that it appeared from the pleading demurred to that the twenty years had elapsed.

The allegation was that possession had been taken "*about a year*" after the mortgagor's death, which had occurred in May, 1838. The bill was filed in October, 1859. The statute was discussed on the alternative hypothesis of the twenty years having run. The opinions of both the learned Judges whose judgments are noted were in accordance with the view of the law suggested in *Fisher* on Mortgages, and against that which Lord St. Leonards had indicated. To shew the way in which the statute was construed, and the effect given to the arrangement of the sections in the consolidation, I shall read an extract from the judgment of the Chief Justice as reported in 8 U. C. L. J. 93. His Lordship spoke of the difficulty arising from want of a precise statement in the bill of the time when possession was taken, and the absence of an answer stating the time; and then assuming that, on the principle that all statements ambiguously or doubtfully put were to be taken in the most stringent sense against the pleader, it should be held that the bill shewed twenty years to have elapsed,

he is reported to have said: "We have to consider the 16th, 17th, 28th, 32nd, and 36th clauses of the statute of 1834, chapter 1, or rather taking those provisions as they stand in the existing statute, chapter 88, of the Consolidated Statutes of Upper Canada, sections 1, 2, 21, 31, and 46 (45 ?) We have the general rule as regards actions for legal rights in section 1, namely, that the action must be brought within twenty years next after the time when the right to bring the action accrued. In section 2 we are told when the action shall be considered to have accrued. Section 21 makes special provision in regard to mortgages. That a suit to redeem shall not be brought but within twenty years next after the time at which the mortgagee obtained possession of the estate mortgaged, or receipt of the rent or profits, unless when a written acknowledgment of the mortgagor's title or his right to redeem has in the meantime been given. Section 31 provides in effect that a person claiming any land or rent in equity must bring his suit in equity within the period during which he might have brought an action (at law) to recover, if he had been entitled at law to such estate or interest as he shall claim in Equity. And following all these provisions comes the 46th section, which enacts that if at the time at which the right of any person to bring an action to recover any land or rent shall have first accrued, as thereinbefore mentioned, such person shall have been an infant, then such person may, notwithstanding the period of twenty years may have expired, bring his action to recover such land or rent, at any time within ten years next after he shall have ceased to be under such disability." The judgment concludes with another passage which I shall also read, but which I can scarcely think can be correctly reported where it refers to the object of section 21. It is as follows:—"The 21st clause, which especially relates to mortgages, does not, it is true, contain within it any exception on account of infancy or other disability, but that is because the sole object of that clause was to settle the question at what time the right to sue for redemption shall be taken to begin, that is to say, not

from the time of the estate becoming absolute at law, as might without this clause have been contended, but from the time of the mortgagee entering into possession." If the reference to the right to sue for redemption is to be understood literally, it is incorrect, for a mortgagor can certainly sue for redemption as soon as the mortgagee's estate is absolute at law. I understand the learned Chief Justice, however to allude to the right *against which the limitation begins to run*. The object of the clause, and its sole object, was to settle the time from which that right was to date, and it does so by fixing the time when possession is first taken; but this understanding of the clause does not weaken the effect of the absence from it of any provision for disabilities.

This case of *Hall v. Caldwell*, so far as it decides anything, would of course be an authority binding on us to the same extent as we are bound by any other previous decision of this Court. It was decided in 1860, and may be presumed to have been followed, if occasion arose since that time. If it were the decision of a Court of first instance the fact that it had been followed by Courts that had not power to overrule it would not be an insuperable obstacle to its reconsideration. *Reg. v. French*, 4 Q. B. D. 507., per Brett, L. J., at p. 517, and per Cotton, L. J., at p. 521.

I am not satisfied that we can treat the case of *Hall v. Caldwell*, as really deciding more than that that plaintiff was entitled to redeem.

It is not clear that the judgment proceeded upon the assumption that twenty years had been shewn to have elapsed. We have the opinions of two very eminent Judges upon the construction proper to be put upon the enactments as found in the consolidated statute, and though in the last passage I quoted the reasoning may not seem satisfactory, the conclusion adopted by those two learned judges is clear enough.

The other five Judges of the seven who formed the Court before which the appeal was heard, may have been

and probably were of the same opinion ; but under all the circumstances I am not inclined to regard the decision as one which would preclude us from dealing with this question of disabilities as still an open question, even if no change had taken place in the law. But an important change has taken place by the passage of the Act of 1874, 38 Vict. ch. 16.

That statute is obviously framed after the Imperial Act 37 & 38 Vict. ch. 57, and when we are inquiring how far it may be taken to confirm or to discountenance the opinions on which the plaintiffs now rely, it will be useful to note the similarity between the two statutes, and still more so to observe one or two particulars in which our Legislature has been careful to secure greater precision in expressing its intention by varying the language of the model which in the main it was following.

The first particular is in the preamble to which my brother Burton has called attention. The Imperial Act simply recites that it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon. In our Province where the ruling in *Hall v. Caldwell* had suggested that an action to redeem was included in this description of an action to recover land, the preamble carefully preserves the distinction between the two classes of action by reciting that it is expedient to lessen the time for making entries and distresses, and for bringing actions and suits to recover land or rent, *and also* to lessen the time for redemption by mortgagors &c. The same distinction is preserved in the sixteenth section, to which my brother Burton has also alluded. But there is another instance which strikes me as very important. It occurs in the fifth section, which, like section three of the Imperial Act, deals with disabilities, and which in both statutes alike precedes the sections on the subject of the redemption of mortgages. In the Imperial Act the words are, "If at the time at which the right of any person to make an entry or distress or to bring an action or suit to recover any land or rent

shall have first accrued, *as aforesaid* such person shall have been under any of the disabilities hereinafter mentioned," &c. &c.. In our Act the words "*as aforesaid*," are omitted. Construing each sentence by itself, the slight difference of phraseology may be unimportant, but it becomes of very great importance when we obey the directions of section 15 of our statute and substitute the new section 5, for section 45 of the consolidated statute. When we do this we have eliminated from section 45, the words "*as hereinbefore mentioned*," which received so much effect in *Hall v. Caldwell*, and we are left at perfect liberty to construe all the enactments of the statute by the force of the language in which they are expressed. It certainly cannot be maintained that the statute of 1874 evidences any legislative adoption of the opinions expressed in *Hall v. Caldwell*, a contrary inference would seem more reasonable from the change in the language of the enactments. It seems to me free from reasonable doubt that this Act of 1874, framed as it is, cannot with propriety receive a different construction from that given to the Imperial Act of 1833, by Sir George Jessel, in *Kinsman v. Rouse*, and to the new Act of 1873, by Sir James Bacon, in *Forster v. Patterson*.

It may not be out of place to glance at the Revised Statutes of Ontario, although we are not in strictness required to do so, because if the plaintiffs are barred, they were barred before those statutes took effect.

Chapter 88 of the C. S. U. C., has become, with its amendments and additions, chapter 108 of the R. S. O. The relative position of the clauses has not been varied, but while the disability clauses remain at the end, there would have been nothing on which to rest an inference such as in *Hall v. Caldwell* was drawn from the words "*as hereinbefore mentioned*" if the new section 5 had, in pursuance of the directions of section 16 of the Act of 1874, been simply substituted for section 45. It happens, however, that in section 43 of the Revised Statute which occupies the place of the former section 45, the words "*as aforesaid*," which were not in section 5, have been inserted,

making it read: "If at the time at which the right * * first accrues "*as aforesaid*" such person is under any of the disabilities," &c. This is not a return to the precise language of the old section 45, where the words were "as hereinbefore mentioned." If it had been so no inference would thereby have been created that the Legislature intended to adopt the opinions expressed in *Hall v. Caldwell*. The statute 41 Vict. ch. 6, sec. 3, expressly guards against such effect being given to the Revised Statutes.

I do not know how these words "*as aforesaid*" found their way into the Revised Statutes. They were not in the roll marked X, mentioned in 40 Vict. ch. 7, nor are they among the amendments of that roll authorized by the Act. Yet inasmuch as the Revised Statutes were confirmed in their completed shape, by 41 Vict. cap. 6, the words must be taken to be properly there, and it may yet become necessary to determine whether by introducing them a change in the law has been effected.

I do not think it should be so held. The Revised Statutes are not held to operate as new laws, but are to be construed and have effect as a consolidation, and as declaratory of the law as contained in the Statutes for which they are substituted: 40 Vict. ch. 6 s. 10.

Under the corresponding provision of the C. S. U. C. it was more than once expressly laid down that the Court could properly look at the original statute as a guide to the interpretation of the law as found in the consolidated Act. One instance of this occurred in the Court of Error and Appeal, in *Whelan v. The Queen*, 28 U. C. R. p. 117.

There is no reason to hold that the effect of the clause containing the words "*as aforesaid*," is different from what it would have been without them. They correctly refer to the earlier provisions which limit the time for making an entry or distress, or bringing an action or suit to recover any land or rent. But as words nearly like these, in the old section 45 were considered to aid the construction which extended the effect of the clause to proceedings which the statute did not describe

as actions to recover land or rent, it may be useful to bear in mind what the law was which the statute professes to consolidate and not to alter.

For the reasons I have so far given I think we should not only allow this appeal, but should also dismiss the action.

Upon the other questions dealt with in the Court below my opinion is, that if the disability clause were properly held to apply to an action for redemption, then as between the judgment of Vice Chancellor Blake and that of the Divisional Court, the former ought to be sustained.

The disability clause, R. S. O. ch. 108, s. 43, can only be held to apply by regarding the action to redeem as being an action to recover land, and as dealt with in the statute by that name. The consequence of this necessarily is that, under section 15, the right of every one barred by the statute is extinguished, and without entering upon a disquisition as to the precise technical character of the estate acquired by the man in possession who cannot be disturbed by the original owner, but who can evict the original owner if he should happen to regain possession, the practical result is that, as between the two, the man who may have entered as a wrongdoer, if the case were one of ordinary dispossession, has become the owner. The case of a mortgagee in possession is thus noticed in Darby and Bosanquet on Limitations, p. 364. "Now it would seem clear that twenty years is here limited by this act to a person (namely the mortgagor) for bringing a suit (namely a redemption suit), and therefore that by the 34th section the right and title of that person to the land or rent, for the recovery whereof such suit may have been brought within such period is extinguished. If this be so, the mortgagee has, at the end of the period of twenty years a perfect title to the property, and the mortgagor is an entire stranger to it, and no subsequent acknowledgement can divest the title of such person who was once the mortgagee, but now the complete owner of the property, and transfer it to the person who once had a claim on the

property as mortgagor, but now has no claim at all." This last proposition was for some time involved in a little doubt by reason of the case of *Stansfield v. Hobson*, 3 D. M. & G. 620, in which the Lord Justices Knight Bruce and Turner had held in favour of the right of a mortgagor to redeem in a case where the acknowledgment on which he relied had not been given till after the twenty years possession was complete, that fact however not being alluded to in their judgments although raised in argument. The case is cited in *Fisher on Mortgages*, (p. 739) as deciding that an acknowledgment even after the 20 years is available to restore the right to redeem, but since the decision of *Sanders v. Sanders*, 19 Ch. D. 373, it can be no longer relied on for that purpose.

As against those plaintiffs who are barred, the estate of the defendant must be as absolute as if they had executed deeds of release to him. The reasoning which would sustain their present contention would, I apprehend, equally entitle them to a decree for redemption in the face of such deeds, which cannot be a tenable position.

Those plaintiffs who are not barred do not claim to redeem in respect of a partial interest in the estate. Their title is an undivided interest with the defendant in the whole estate, which takes the case outside of the doctrines for which we were referred to *Pearce v. Morris*, L. R. 5 Ch. 227 and other authorities, where the right of one interested in any part of the estate to redeem in full is explained. In *Pearce v. Morris*, Lord Hatherley states that there should be expressed on the face of the conveyance from the mortgagee to the person who redeems him, a statement of some kind with reference to the exact position of the parties, shewing that the party so redeeming, having only a partial interest, is to hold subject to the rights of redemption of all persons who hold other interests. In this case the conveyance would have to be from the defendant to two plaintiffs, subject to the defendant's right to redeem them, a circuitry which I think was properly avoided by the form of the first decree, and this is more

apparent when we remember that the subject matter of this action is after all the money for which the land has been sold, and not the land itself.

In the view of the case which I understand to be taken by his Lordship the Chief Justice, the discussion of the matter to which I have so far directed my attention is unnecessary. I understand him to treat the transaction under which the mortgagee took possession of the land as a fraud, by means of which the mortgagee led the plaintiffs to suppose that he had made an actual sale of the land, and to believe that when he entered he did so under a title acquired from the purchaser which they could not dispute; that, therefore he cannot now be heard to say that he was in as mortgagee: and that since the discovery of the fraud the plaintiffs have not been guilty of laches which would disentitle them to avoid the sale, which was always avoidable and not void, and to obtain the relief they now seek.

The difficulty which I find in the way of dealing with the case in this manner, is that no such case has been made either by the pleadings or in the conduct of the action. The bill of complaint expressly asks for a declaration that Andrew Faulds always had the lands as mortgagee, and in no other way. No issue being raised upon the important question of the time when the plaintiffs acquired knowledge of the character of the transaction between Andrew Faulds and Joseph Harper, no attention was directed to it at the trial, and we are consequently without any finding as to the fact, and at the same time without direct evidence upon it. We ought at least to have had the account of the matter from the plaintiffs themselves. One of them was examined, viz., Elijah W. Faulds the eldest of the family, and thirty-six years of age. He speaks incidentally of a time, which seems to have been about fifteen years before the trial, when something was being said which seems to have involved the question of some right on the part of the plaintiffs to the property, but he does not say he had not always known the real

character of the sale under the decree. Mrs. Matilda Faulds, the mother of the plaintiffs, said in answer to questions, that it was said at the time of the sale that Joseph Harper bought the place, that she imagined from the very beginning that she or her children had a claim on the place. She did not speak about it to Andrew Faulds her father in law after the place was in Chancery, and did not protest to him that she or her children claimed it, but the neighbours talked backwards and forth about their rights. Other witnesses called for the plaintiffs to prove that the property had been bought at the sale by Joseph Harper for his father in law, Andrew Faulds, shew that they knew of that at or soon after the sale, some of them from Faulds, and some from Harper. The reason given by Faulds for having it bought by Harper being, however, one rather indicative of fraudulent intentions, namely, his knowledge that he could not legally buy it himself. The evidence is not sufficient to support an intelligent finding that the plaintiffs, or those who ought to have looked after their interests, knew at the time of sale, or at any definite time afterwards, the nature of the transaction; but on the other hand I do not think it would be right to assume upon this evidence, and having regard to the circumstance that the matter was not in issue, to decide, that there was not knowledge at so early a date as to deprive the the plaintiffs of the right to now take the position of which His Lordship the Chief Justice thinks the case susceptible. Such allusions to the matter as the evidence contains seem to me rather to tend in the direction of suggesting that there was that early knowledge, and thus to account for the fact that the position has not been taken by the plaintiffs themselves.

MORRISON, J. A. concurred in the opinions expressed by Burton and Patterson, JJ. A.

Appeal allowed, with costs. [SPRAGGE, C. J. dissenting.]

BRAYLEY V. ELLIS AND TAYLOR.

Pressure—Fraudulent preference.

In March, 1879, the defendant E., a milliner, removed her business to the village of Tara, and in the November following changed her then residence and place of business to a shop owned by her co-defendant, adjoining to and under the same roof as his own. In the spring of 1880 the defendants commenced other business transactions, when her co-defendant lent E. \$120 to enable her to purchase stock for her business, she promising to give him security for its repayment by executing in his favour a mortgage on everything she had. The parties continued their business relations, T. advancing E. moneys from time to time, till in November, 1880, she was indebted to him in the sum of \$463.73, including one year's rent of her shop, a bill of E.'s for medical attendance, and a sum for interest accrued due, and for which she executed a chattel mortgage, covering all her stock in trade and household effects. Both defendants swore that E. refused to execute the security, notwithstanding her promise to do so, until after the receipt by her of a letter from T.'s solicitors demanding payment, or in default an action would be brought.

Per SPRAGGE, C. J. O., and BURTON, J. A., [affirming the judgment of FERGUSON, J., 1 O. R. 119,] that although the transaction was open to grave doubts, yet the same having been sustained by the Judge who heard the evidence, and who considered that there was sufficient pressure proved to shew that the mortgage was not given voluntarily, there were no sufficient grounds shewn to justify an interference by this Court with the decision of the learned Judge.

Per PATTERSON and MORRISON, JJ. A., dissenting.—The evidence sufficiently established that the mortgage was given with intent to prefer the mortgagee to the other creditors of the mortgagor: that it was not given in consequence of pressure on the part of the mortgagee, or in fulfilment of a promise to give it; and even if such pressure or promise had satisfactorily been shewn, the intent to prefer would nevertheless have existed within the meaning of the statute, and have defeated the mortgage.

THE plaintiff James Brayley instituted proceedings in the Chancery Division against the defendants, to set aside a chattel mortgage executed by the defendant Ellis in favour of the defendant Taylor, as fraudulent and void, as against the plaintiff and the other creditors of the defendant Ellis, and came on to be tried before Ferguson, J., at the Autumn Sittings of 1881 in Toronto, when the action was dismissed with costs as reported 1 O. R. 119, where and in the present judgment the facts are stated.

From that judgment the plaintiff appealed, and the appeal came on to be heard before this Court on the 4th September, 1883.*

Gibbons, for the appellant. The evidence shews that the chattel mortgage was given on all the stock in trade of the mortgagor, then in the premises, or which she might

(*) *Present.*—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

subsequently receive therein, the stock in hand being insufficient to pay the mortgage to the defendant Taylor, and as she states in her evidence she had no other assets, of which fact Taylor was aware, the purchase of further stock was a fraud; in this he participated, and was sufficient to prevent the doctrine of pressure from applying, if in any case it would apply to support a general assignment, as this was of *all* the debtor's estate. Evidence was tendered, and should not have been rejected to shew that the defendant Taylor after receiving the mortgage, recommended the defendant Ellis, as worthy of credit, and thereby enabled her to procure further advances of stock of which the defendant Taylor was certain to obtain the benefit. Here the mortgage contained a provision enabling the mortgagee, Taylor, to take possession of the mortgagor's stock, if she sold or parted with any portion of it, thus placing the assets then in her possession, as well as any new goods purchased, at once subject to his disposition and sale.

W. H. Cassels, for the respondents. The money lent by Taylor to his co-defendant, and which formed the consideration for the chattel mortgage, now in question, was solent in good faith, relying upon her promise to make and execute such mortgage in security for the advances; and the mortgage was drawn according to the forms in general use, and was not more onerous in its terms than the defendant Taylor was entitled to, or than the defendant Ellis agreed to give, and inasmuch as the defendant Taylor was lending his co-defendant money wherewith to purchase further stock, it was but just and reasonable that the mortgage should cover future acquired stock; and as it was in the contemplation of the defendants, that the mortgagor should carry on business and dispose of the stock then in hand, it was only just that future stock should become liable to and be covered by such mortgage.

The mortgage even though it covered all the assets of the defendant Ellis, was not an absolute disposal of the goods, and the plaintiff and other creditors of Ellis

could have redeemed the goods covered thereby on payment of the amount due to Taylor. Here the evidence establishes clearly that the mortgage was given under threat of legal proceedings from Taylor's solicitor, and if it had not been then given Taylor would have sued and recovered judgment, and would thus have obtained all, and more than all, the advantage he has gained under the mortgage. Then again, the mortgage was duly filed, and was thus notice to all persons dealing with the defendant Ellis thereafter, and the plaintiff cannot now complain that the defendant Ellis purchased goods from him after the creation of such incumbrance. The cases cited are mentioned in the judgment.

March 4th, 1884. BURTON, J. A.—There is no allegation in this bill that the defendant Ellis was insolvent or unable to pay her debts in full, or that knowing herself to be on the eve of insolvency the chattel mortgage was given with either of the intents mentioned in the statute. The case attempted to be made by the bill is one which, though it might, if borne out in evidence, entitle the plaintiff to relief against the defendant Taylor by reason of the fraud alleged, does not seem to be one in which he was entitled to sue on behalf of himself and other creditors, and it appears to me that on this ground alone we should be justified in dismissing the appeal; but even if the bill were properly framed to raise the questions that were discussed before us I should still be of opinion that no sufficient grounds have been shewn for interfering with the decision of the learned Judge.

This case has been argued as if the mortgage was invalidated under the provisions of cap. 118 of the Revised Statutes.

If I understood the argument of the learned counsel correctly it was that if this were a case under the Insolvent Act formerly in force, the transaction would amount to an act of insolvency. That the mortgage being so worded as to enable the mortgagee to seize after acquired property, even though given in pursuance of an antecedent agree-

ment or under pressure, would be necessarily bad as an act of bankruptcy, and that even in the absence of an insolvent law, it is all but conclusive evidence of an intent to defeat or delay creditors.

I do not agree in the view that a mortgage so worded as to enable the mortgagee to seize not only all the property comprised in it, but all which the mortgagor might subsequently acquire, even for a past debt, if given in pursuance of an antecedent agreement, would be necessarily an act of bankruptcy, although the *onus probandi* would be upon the person setting up the agreement to prove not only that the agreement did exist in fact, but that it was in all respects a *bond fide* agreement.

The Court of Appeal in the case of *Ex parte Hauxwell—In re Hemingway*, 23 Ch. D., at p. 638, expressly held that so far as *Graham v. Chapman*, 12 C. B. 85, is supposed to be an authority to the effect that a bill of sale in the form there used was necessarily bad, had been dissented from and overruled, and could not be supported.

In the present case, the transaction could not, I think, be supported on the ground of the security being given in pursuance of the antecedent agreement, as the mortgage is more extensive than the agreement proved, but the learned Judge has found in addition that it was given on account of the pressure brought to bear upon the mortgagor by the creditor. I do not know that I should have come to the same conclusion, and I am free to admit that the case presents itself to me as one of grave doubt and suspicion, and I agree in the remarks that have been made by learned Judges that in cases of pressure or prior agreement the evidence should be scrutinized with very great care, but we must bear in mind that we are now dealing with the judgment of the Judge who heard the case, and as he has come to the conclusion upon the evidence that the mortgage was not made with either of the intents mentioned in the statute, but was in fact executed by reason of the pressure which was brought to bear upon the defendant Ellis, before we can reverse that decision we must be satisfied that he was wrong.

I should have rested satisfied with saying that nothing that has been said has led me to that conclusion, but for the view entertained by my brother Patterson that the doctrine of pressure has no application to this statute. I understand his view to be that whilst it might be important as negating the spontaneous or voluntary character of the act, it is not so as regards the intent.

In the great majority of cases the question of preference would be determined by the fact that the payment was the spontaneous act of the debtor, and so the proof of pressure has come to be regarded as important in rebutting the inference arising from the apparent spontaneity of the act, but the absence of pressure would not be conclusive in a case where other circumstances are shewn tending to rebut the presumption of intent.

The true question after all is: With what intent was the payment made? Was it to give the particular creditor a preference? It is this intention to act in fraud of the law which stamps the preference, however morally honest, with the character of fraud. The intention of the party making the payment to defeat the law, even under the bankruptcy law was always considered as the cardinal point on which the whole question turned.

In *Hartshorn v. Slodden*, 2 B. & P. 582, it was said: "It is with reference to the intention and motives of the party making the payment that the fact of threats or importunity on the part of the creditor becomes in the majority of cases a matter of so much importance."

And again in *Bills v. Smith*, 6 B. & S. 314, the pressure of the particular creditor does not make the payment any the less contrary to the policy of the bankruptcy law which seeks to insure the ratable distribution of the insolvent trader's assets but which is defeated by the payment to the particular creditor. The effect of pressure, therefore, is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction. See also *Smith v. Pilgrim*, 2 Ch. D. 127.

If the language of this statute had been similar to that in question in *Davidson v. Ross*, 24 Gr. 22, or if it had simply declared that if a person in insolvent circumstances should make a transfer not with the intent to give a preference, but the effect of which would be to give a preference to one of his creditors over his other creditors I should agree that there could be no room for invoking the aid of the doctrine of pressure, and the strange result would follow that whilst in a law passed for the express purpose of securing an equal distribution of an insolvent debtor's assets among all his creditors, a preference if not unjust would be upheld, in another Act which has no machinery for securing this equal distribution but frequently destroys the security of one creditor with the effect simply of transferring the preference to another, a preference however just and equitable would be impossible and a security given under circumstances which would render it valid under an insolvent law, would be set aside not for the purpose of an equal division, but simply to give to another creditor with perhaps a far less meritorious claim, a preference secured to him by the accident of his having been more diligent than others in obtaining an execution.

Under the Act we are now considering it is necessary, I apprehend, to shew an intent both on the part of the grantor and grantee in order to invalidate the transaction. There would seem to be no good ground why one creditor having succeeded with or without pressure in obtaining a security for a just debt, *bond fide*, should be deprived of that security any more than a creditor who has obtained payment from his debtor on the eve of insolvency. Both these transactions are, I assume, protected, unless it can be shewn that the intent to prefer was participated in by the recipient.

It appears to me, therefore, that the doctrine of pressure is fully as applicable to the statute we are considering as under the English Bankruptcy Acts, where the enactment is that every transfer by any person unable to pay his

debts as they become due from his own moneys in favour of any creditor with a view of giving such creditor a preference over other creditors shall, if the person making the same become bankrupt within three months be fraudulent and void as against the trustee, and as our Act has now been on the Statute Book for over a quarter of a century and has hitherto received uniformly a different construction from that now attempted to be placed upon it; we ought not to interfere with that construction upon light grounds.

I do not understand the decision referred to by my brother Patterson of *Ex parte Griffith*, 23 Ch. D.69, as he does, nor do I think that it at all conflicts with the decision in *Re Tempest*, except upon the question of mixed motives.

I can quite understand that in placing a construction upon the section of the Act of Parliament they were considering, the Court would have regard to the statutory definition of a fraudulent preference, and that they would not necessarily be guided by the decisions before the Act; but I do not understand, from the language of the Judges in that case, that even under the wording of the enactment they were then considering, and which I have quoted above, they would have held the doctrine of pressure inapplicable if the evidence of it had been sufficient.

They held that the transaction would have been a fraudulent preference under the old law, and Lord Justice Bowen held the assignment not only made with a view (which are the words of the English Act) to prefer the creditor, but to give the *coup de grace*, as he said, to it, *sitting as a jurymen*, he held that it was made with the sole view of giving that preference.

That is intelligible enough. The Court held that it was not given in consequence of pressure, but simply with the view of giving a preference.

Nor do I think it necessary to enter into any discussion as to whether the intent or motive to prefer is required to be the sole motive; all that I am at present concerned with is the question of whether if it be shewn satisfactorily

that the mortgage is given under pressure that prevents the application of the statute.

Lord Justice Bowen took part in a more recent judgment than the one just referred to, *Ex parte Hill*, L. R. 23, Ch. 695, in which the section of the Bankruptcy Act to which I have alluded came again in question, and after referring to the generally expressed opinion that the old law as regards fraudulent preference had not been altered, he proceeds: "But however that may be we have to look to the words of section 92, and they are, 'with the view of giving such creditor a preference over the other creditors.' There are only three conceivable meanings which these words can have: 1. They may conceivably mean the case where the debtor has present to his mind as one view among others the giving a preference to the particular creditor. I do not think that this is the true interpretation of the words: 2. Another possible construction of the words is, to read them as equivalent to 'with the view' the real effectual substantial view of giving a preference to the creditor, the word *a* being equivalent to *the*. I think that this is the correct interpretation. 3. The other conceivable construction is to treat them as equivalent to 'with the *sole view* or sole motive.' * * Is then the expression with a view convertible into 'with the sole view?' My answer is, that the latter words are not in the Act, and I do not wish to lay down that they mean the same thing." And further on he says: "It is a very difficult matter to prove that the dominant motive was the sole motive, and I think the true test * * is this: (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view? That appears to me to be the right construction of sec. 92, though it is not absolutely necessary to decide it now. Bankruptcy law, however, is a matter in which it is so important to keep the propositions of law distinct from their application to the facts that I have thought it right to say what I have said;" and he adds, "And I do not think I have said anything contrary to any of the decided cases." An expression he

would scarcely have used if he took the same view of the matter as my brother Patterson. He then deals with the facts, affirming the judgment of the Court below, and holding that the bill of sale was executed with the dominant and substantial view of preferring the creditor; that he could detect no other view, and if necessary so to decide, he should decide with the sole view of giving that preference.

But the *ratio decidendi* in bankruptcy cases does not apply to cases under this Act, the object of the two statutes is different. The bankrupt laws are for the purpose of obtaining an equal distribution of the assets.

This Act, like the Statute of Elizabeth, has no such object, although it goes one step further than that statute, and avoids transfers made with the intent to give a preference. I quite agree that we should endeavour to give effect to these words; but we have still to deal with the question of fact. Was the transfer made with that intent—to the knowledge of the grantee? and I do not think it possible to exclude the question of pressure or no pressure in coming to a conclusion upon that question. I think, therefore, we should hold, in accordance with a long series of decisions in our own Courts, that it may be an element in the case in tending to rebut the presumption of an intent on the part of the debtor to give a preference or to delay or defeat creditors. How much or how little evidence of pressure should be sufficient to satisfy the tribunal trying the case is another matter. It is always a question of fact and one difficult to make out.

I agree in thinking that the mortgage given in this case was not in compliance with the agreement proved, and therefore cannot be upheld on that ground, but I think the doctrine equally with that of pressure applies to our statute, so that if it could be satisfactorily established that the mortgage was in good faith given in pursuance of a contract or engagement to that effect, and in accordance with the terms of such a contract it would tend to negative the intent, and the mortgage would be valid.

I think no sufficient grounds have been shewn for interfering with the decision of the learned Judge; and we should dismiss this appeal, with costs.

SPRAGGE, C. J. O.—I agree in the judgment of my brother Burton, and do not think it necessary to add very much to what he has said.

I understand my brother Patterson to base his judgment mainly upon the decision of the Lords Justices in *Ex parte Griffith*, 23 Ch. D. 69; and upon the reasoning by which that decision was arrived at. There are expressions in the language of one of the Lords Justices, Lord Justice Bowen, which imply at least a doubt of the soundness of some of the earlier decisions, but the case is not an authority against the applicability of the doctrine of pressure, to the clause of the Act upon which the case was decided.

The clause avoids as fraudulent and void, as against the trustee of the bankrupt every conveyance or transfer of property, &c., by any person unable to pay his debts as they become due from his own moneys in favour of any creditor with a view of giving such creditor a preference over the other creditors, if bankruptcy ensue within three months thereafter.

There had been a previous decision under the same clause of the Act *Ex parte Bolland* L. R. 7, Ch. 24 by two very eminent judges, Lords Justices James and Mellish. A payment of £1,072 had been made by the bankrupt shortly before his bankruptcy to one of his creditors, a Mr. Matthews, and the questions left to the jury were, "whether the bankrupt when he made the payment to Mr. Matthews was unable to pay his debts as they became due from his own moneys, and made it with a view to give that gentleman a preference over his other creditors * * whether the payment was made by the bankrupt voluntarily and without real pressure, bankruptcy being reasonably imminent." The jury found that the bankrupt when he made the payment was unable to pay his debts in full from his own moneys, that he did not make it with a view to give

Matthews a preference over his other creditors, and that the payment was voluntary and without real pressure, bankruptcy being reasonably imminent."

Both the Lords Justices held that the finding upon the first point in favour of the payment was conclusive; that it negatived the payment being such as is avoided by the Act, that it was, as put by Lord Justice James: "An express finding upon the very point which the Act of Parliament makes the test of fraudulent preference," and that the finding as to the absence of pressure was immaterial; and as to that point Lord Justice Mellish observed: (p. 26), "Whether there was anything that a jury would consider real pressure is not at all a test whether there was fraudulent preference. It is perfectly clear on the authorities, and we acted on that view in *Ex parte Tempest*, L. R. 6 Ch. 70, that if there had been such a demand as partly influenced the bankrupt in making the payment, so that he did not make it entirely voluntarily, the payment is not a fraudulent preference. The words 'voluntarily' and without 'real pressure' (the terms in which the question was left to the jury) make this question one which would tend to mislead the jury; and to induce them to believe that if there was not what they considered real pressure, although there was such a degree of demand as to prevent the payment being made with a view to give the creditor preference over the other creditors then it was fraudulent preference." It is clear from this that the Lord Justice, so far from discarding pressure as an element of consideration, in judging of the intent or "view" of the debtor in making the assignment found fault with the terms in which the second question was left to the jury; because a jury might be misled by them, and understand by the words "real pressure" more than the law required in order to negative a fraudulent intent to prefer.

This is all the more clear when we refer to *Ex parte Tempest*, and the language of both the Lords Justices in that case, 6 Ch. 70. *Ex parte Bolland* was referred to by

Sir Geo. Jessel in *Ex parte Griffith* 23 Ch. D. 69, without any intimation that he dissented from it.

At the same time it must be conceded that the learned Judges who decided *Ex parte Griffith* manifested a disposition to regard the old cases upon the doctrine of pressure as having gone too far, but still without discarding it as an element of consideration. Thus Sir George Jessel, in the course of the argument, interposes the observation: "You must shew that the bankrupt acted under some coercion, that there was something to control his will," a remark indicating the idea of the learned Judge that while on the one hand a mere request by the creditor which the debtor might feel at liberty to disregard, would not be sufficient; on the other hand a pressure which amounted to coercion, a something which controlled the will of the debtor, would be sufficient.

In *Ex parte Griffith* there was really no room for question. The creditor was invited by the debtor to come to him in order to his debt being provided for. It was a great hardship if he should lose it, and that was felt by the debtor as well as by the creditor himself; and there was no unwillingness on the part of the debtor to make the payment to this particular creditor. No coercion on the part of the creditor was needed. There was no controlling of his will, for his will went along with his act. He was hopelessly insolvent; he obtained no personal benefit in making the payment, and could have had no motive for it except that of giving this creditor a preference over his other creditors. The conclusion was inevitable; that he made the payment to this creditor "with a view" of giving him a preference. He signed his liquidation petition on the day following.

I doubt if such a transaction would ever have been supported on the ground of pressure under any interpretation of any bankruptcy or insolvency law.

It is not to be forgotten that our Provincial Act makes the intent with which a transfer is made, an element in determining the character of the act. The act *per se* is

not avoided ; nor is an act by such a person producing a certain effect avoided, as in the clause of our Insolvent Act under which *Davidson v. Ross* was decided in this Court, but the intent proved or to be implied must be present, otherwise the act is not reached by our statute. It follows from this that anything bearing upon the question of intent may be shewn ; anything that would tend to shew such intent as is pointed at by the statute ; and on the other hand anything that tends to negative such intent. If that be so, it is impossible to exclude the doctrine of pressure. The pressure brought to bear upon the debtor by the creditor may be so strong as, to borrow the language of Sir George Jessel, to amount to coercion ;—to a controlling of the will of the debtor. The case may be put of a debtor who is, in the strict and proper meaning of the term, in insolvent circumstances, but who yet honestly believes that if his creditors exercise towards him a reasonable forbearance he will be able to recover himself, and, if a trader to continue his business ; and who may also be right in his contention upon that point. Such a man may very unwillingly yield to the pressure of a creditor, the alternative being presented to him of the closing of his business. Such a man yields not with any intent to prefer the pressing creditor, but because in his position he could not help himself. The Legislature might have left out the words “with intent to defeat or delay,” “with intent to give one or more of the creditors a preference,” but the words are there, and we must give all due and proper effect to them.

I think there is much force, and great justice, in the observations of the learned judges who decided *Ex parte Griffith*, and that in some of the previous cases the doctrine of pressure has been pushed, to what I must take the liberty of calling an unreasonable extent ; but for the reasons that I have given I do not feel warranted in excluding it altogether in any case, where the intent of the debtor is made an element of consideration.

In the case before us there was, I think, pressure on the part of Dr. Taylor, in what is in my judgment the proper

meaning of the term. His debtor had promised to give him security by chattel mortgage, and then refused to fulfil her promise. She was then coerced into giving it by her debt being put in suit, and what is called a lawyer's letter being thereupon written to her by her creditor's solicitors. It does not to my mind make any difference that the solicitor's letter did not in terms press for a mortgage. It was intelligible enough without that. It followed a refusal to give a mortgage, and it was followed by a consent to give it. It was a mode of pressing for the mortgage, and it was under that pressure that the mortgage was given.

For these reasons, and for the reasons given by my brother Burton, I concur in his judgment.

PATTERSON, J. A.—The plaintiff sues on behalf of himself and all other creditors of the defendant Ellis, except the defendant Taylor.

His prayer is, that a chattel mortgage made by Ellis to Taylor may be declared void as against him and the other creditors of Ellis, and for consequent directions with regard to the goods, &c.

The defendant Mrs. Ellis, who is a milliner, began business in the village of Tara in March, 1879. At that time she states she had no means. I do not notice in the evidence any distinct statement as to her circumstances in November, 1879, when she became tenant of the defendant, Dr. Taylor, from whom she rented the place into which she then moved, at \$8 a month, payable yearly. In December, 1879, and January, 1880, she appears to have borrowed some small sums of money from Dr. Taylor, and about the 1st of February a sum of \$120. This was to enable her to buy goods in Toronto, which she represented she could do to better advantage than at Owen Sound where she had been in the habit of dealing.

Dr. Taylor asked what security she could give, and she promised him a mortgage "on her stuff," as the doctor expresses it. No mortgage was given until 16th Novem-

ber, 1880. Mrs. Ellis had borrowed further sums from Dr Taylor, one on 4th October, being \$44, and one on 4th November, which was the last of them, being \$62. This sum Dr. Taylor states was to meet a draft for that amount due to White & Co. He was to let her have more money in a short time, but on consideration he told her that he could not give her any more, and that he required her to fulfil her promise to give the mortgage. She refused to do so, whereupon he instructed his solicitors to collect the amount due him. They wrote her on the 12th November, that the amount, \$463.73, must be paid immediately if she desired to save costs. The letter says nothing about a mortgage. Mrs. Ellis, in her deposition on the motion for an interim injunction, spoke as if the letter had demanded a mortgage as an alternative. This was a mistake. Her evidence at the hearing, when the letter was produced, seems more accurate. I shall read an extract from it.

Q. What did you do upon getting that letter? A. I did not do anything only say that I supposed I must give a mortgage; I could not do anything else; I had to give the mortgage; I did not want to be broke up at the time, and so I gave the mortgage.

Q. Had you been asked to give the mortgage before that? A. Yes, several times.

Q. By whom? A. Mr. Taylor; he asked for it several times.

Q. But had you been asked for the mortgage before that letter? A. Yes; and I had been wanting to borrow some more money, and the doctor lent me some, and then said he would not lend me any more until I gave him the mortgage.

Q. You did not give him the mortgage, and then you got that letter? A. Yes, I was annoyed at the time, and I would not give him the mortgage.

Q. And then he put it in suit? A. Put it in suit, and that was the letter I got.

Q. Who prepared the mortgage? A. Mr. Hales, I think.

Q. And that is how this mortgage came to be given? A. That is how it came to be given.

The sum of \$463.73 was composed of \$328.50 for money lent; \$100 for rent to 1st November, 1880; \$24 for medical

attendance, and \$11.23 for interest. The mortgage was taken for about four dollars more. It conveyed "all and singular the goods, chattels, furniture, household stuff, and stock in trade hereinafter particularly mentioned and described, that is to say,"—then describing some articles of household furniture and some pictures, and proceeding thus: "and also all the stock in trade of millinery and fancy goods, consisting part of silks, satins, velvets, ribbons, laces, feathers, gloves, ties, nets, crapes, mantles, hats, bonnets, and ornaments used therefor, &c., &c., and all other furniture, shop fixtures, and in fact everything in the nature of household and shop furniture and instruments, stock in trade and material, goods, chattels and effects, now in the possession of the said party of the first part in and about the shop and dwelling now occupied by her, and situated on the west side of Post Road, in the said Village of Tara, or which shall or may at any time or times, during the continuance of this security or renewal thereof, be brought into or about the said dwelling or shop, either in addition to, or substitution for the furniture, stock in trade, goods, chattels and effects now being therein or belonging thereto or any of them; and it is hereby agreed and declared that all further property hereinbefore expressed to be assigned shall be subject to the security hereby made, and the powers, covenants, and provisions in these presents contained, although the same or any part thereof may not be capable of passing at law by the assignment hereinbefore contained, and the expressions, 'goods, chattels, furniture, household stuff, and stock in trade,' and 'goods and chattels, furniture, and household stuff * * and said goods, chattels, and property, and said goods and chattels' used in these presents, shall in all cases extend to and include such future property."

This stringent stipulation for the passing of goods acquired after the making of the mortgage, whether in addition to or in substitution for those existing at the time, seems to have been Dr. Taylor's own device.

He had been asked about the promise originally given, which he spoke of as a promise by Mrs. Ellis to give a mortgage on all her stuff, and which she spoke of as to be on everything she had. Then he was asked:

Q. How many days after she rented the property was

it that the promise about the chattel mortgage was made, can you fix the number of days? A. I would not say, maybe it would be two weeks. Q. Within a short time after? A. Within a short time after. Q. How often would you ask her for it between times? A. When she would come for money, sometimes I would say, 'Mrs. Ellis I must have that mortgage executed;' and she would say, then, 'all right, she was willing;' but the thing was put off again. I was busy with my practice, I neglected it."

And a little further on:

Q. When was it first said between you that you were to take the chattel mortgage as well on the future goods. Who mentioned that? A. That was the under—that was the mode of taking the chattel mortgage. Q. Who first suggested that? A. I don't know. Q. Did you know that you could have a chattel mortgage on goods she did not have? A. Yes; I knew it before. Q. Who told you that? A. I knew from cases. Q. How did you know? A. I don't know. Q. Did you consult Kilbourn & Hales as to that when you went there? A. No, I told him. Q. When Mrs. Ellis first went to you she said she was going to give you a chattel mortgage on what? A. On her goods. Q. On what? A. All her furniture, all her goods. Q. Anything said about goods afterwards to come in? A. I don't know that I said anything then. Q. How many goods were there at the time this chattel mortgage was made? I don't know; I have no idea. Q. Took no stock? A. Took no stock. Q. You knew that she went on buying new goods? A. I suppose she did.

This last answer seems open to the charge of not being entirely candid; because it appears that on the 11th or 12th of November Mrs. Ellis went to Owen Sound to meet the plaintiff's traveller, and gave him an order for goods which are charged in the plaintiff's account as of 13th November, and, if I understand the account correctly, amounted to \$171.76, forming nearly half the balance of \$399.93 shewn by the account; and she was on that occasion driven to Owen Sound by Dr. Taylor himself; and it further appears that a week after the mortgage was given Mrs. Ellis incurred a debt of \$157.67 to Messrs. White & Co. for goods then purchased; and that in

February, 1881, she was in Toronto and bought goods on credit from D. McColl & Co. to the amount of \$481.96, and that Dr. Taylor, happening to be in Toronto at the same time, was aware that she was buying, and was actually with her at the warehouse when she made part of her purchases, and had some conversation with one of the firm about her business or her business capacity.

The mortgage money fell due on the first of April, 1881, and some time during that month Dr. Taylor took possession of all the goods in the shop, and I suppose of the household effects also. We have no very specific statement of the values at that time. Dr. Taylor says he took stock, and that the goods amounted to about \$800. Mrs. Ellis says the stock and furniture together were worth \$1,000. They both say that she had nothing else except about \$70 of book accounts. She seems at the time to have owed over \$1,000 to the three creditors Brayley, White & Co., and D. McColl & Co. besides the debt to Dr. Taylor.

It has not been contended on either side that under the effect of the deed, in conjunction with the actual possession taken in accordance with the power contained in it, the after acquired goods did not, as between the defendants, vest in the mortgagee; and having regard to the modern cases on the subject, I apprehend it could not be successfully so contended. The principal English cases are *Lunn v. Thornton*, 1 C. B. 379; *Congreve v. Evetts*, 10 Ech. 298; *Hope v. Haley*, 5 E. & B. 830; *Holroyd v. Marshall*, 7 Jur. N. S. 319, 10 H. L. C. 191; *Langton v. Horton*, 1 Hare 549; *Carr v. Allatt*, 27 L. J. Ex. 385, copied in Appendix to American Edition of 3 H. & N. 964.

The mortgage is attacked on behalf of the creditors as coming within the provisions of R. S. O. ch. 118, sec. 2, which enacts that in case any person being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, makes or causes to be made any gift, conveyance, assignment, or transfer of any of his goods, chattels, or effects, or delivers or makes over, or causes to be delivered or made over any

bills, bonds, notes, or other securities or property, with intent to defeat or delay the creditors of such person, or with intent to give one or more of the creditors of such person, a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer, or delivery shall be null and void as against the creditors of such person.

There can be no doubt that Mrs. Ellis, when she gave the mortgage, was in insolvent circumstances, and that she was unable to pay her debts in full. It is equally clear that the effect of the mortgage, under which the mortgagee was enabled to sweep off everything the mortgagor possessed, including goods purchased after the mortgage was given, for which she had incurred a debt larger than the whole claim of the mortgagee, was to give the mortgagee a preference over her other creditors.

The care taken by the mortgagee to have the deed made comprehensive enough to cover after acquired goods appears from the extract from his evidence which I have read. He knew, as is obvious from the whole evidence, that subsequent purchases would be upon credit, and he took care that, as far as the form of the mortgage could secure it, his charge upon those goods should stand before any remedy of the merchant who gave the credit. He undoubtedly knew of the order given to the plaintiff that day when he drove Mrs. Ellis to Owen Sound to meet the plaintiff's traveller, for goods which could scarcely have reached her shelves when the mortgage was given, and he took care to secure the first charge on those goods as well as upon the other unpaid goods that were already in the shop. His intention to be preferred to all other creditors, and to be paid before any other creditor, no matter whether his claim were for the purchase money of goods sold after the mortgage or for an older debt, could look to any part of the assets that were then in the debtor's possession or should at any time or under any circumstances come into her possession. The same evidence of Dr. Taylor shews that the scheme of taking security on goods not *in esse* was a

conception of his own, not part of any prior understanding with Mrs. Ellis; but she herself shews by one of her answers that she fell in with the scheme and understood the character of the instrument she gave. The mortgage was exhibited to her and she was asked :

" Q. This is on your furniture—household furniture—was it not ? A. Yes.

" Q. Your chattels ? A. Yes.

" Q. All the stock you had ? A. Yes.

" Q. All the stock you were to get in ? A. All the stock that I expected to get."

Having regard to this effect of the mortgage and to the evidence to which I have adverted, it does not seem to me possible to say that at the moment of giving the mortgage there was not the intent in the mind of both parties to the instrument that the mortgagee should, by means of it, be preferred, in his recourse against the assets of the mortgagor, to all her other creditors. The intention of both parties was that the deed should operate to secure him, even though every other creditor went unpaid. It would be proper to infer that intent from the fact that such was the effect of the deed, as the rule may be found laid down in such cases as *Smith v. Cannan*, 2 E. & B. 35 where Jervis, C. J., said, "Indeed I am inclined to think that, as the delay of his creditors was almost a necessary consequence of the deed, and a man must be taken to intend the necessary consequences of his acts, it was scarcely a question to be left to the jury;" and *Freeman v. Pope*, L. R. 5 Ch. 538, where Lord Hatherley used similar language, saying, p. 541 : "Then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." The inference thus indicated would accord with what I think the evidence as a whole proves, namely the intention to give a preference by the mortgage in question.

In *Ex parte Games*, 12 Ch. D. 314, to which Mr. Gibbons referred us, the question was, whether a security given upon an existing stock in trade, &c., and such other goods as should be acquired in substitution for any part of that stock, for an old debt and future advances, was void under the statute, 13 Eliz., c. 5, too long time having elapsed to admit of its being attacked as an act of bankruptcy. The Chief Judge held the deed void, but his decision was reversed in appeal. James L. J., when deciding that the deed was not avoided by the statute as being made with intent to defeat or delay creditors, said, as I say in this case: "It appears to me that the deed was nothing more or less than a preference of this particular creditor."

These considerations, especially the operation of the deed upon after acquired property, do not appear to have been pressed upon the learned Judge at the trial. He notes in his judgment that in his opinion the actual fact was, that the mortgage was not made with intent to give this particular creditor a preference or priority over the other creditors of the mortgagor; but I understand that expression of opinion to be connected with his findings that the mortgage was made in pursuance of a previous promise, and that it was made under pressure from the creditor, and therefore, as he held, not within the prohibition of the statute. I do not gather from anything in his judgment that he doubted that the immediate motive in giving the mortgage was that it should operate according to its plain terms, and place the mortgagee in a position of advantage over all the other creditors; but I understand him to have considered that the motive of that motive—to adopt a phrase from the judgment of James, L. J., in *Ex parte Tempest*, L. R. 6 Ch. 75—was the previous promise and the pressure, and therefore to have concluded that, within the meaning of the statute, the deed was not made with intent to give the preference.

I confess some difficulty in appreciating the evidence of pressure in the same way as it impressed the learned Judge. Mrs. Ellis, as I understand her evidence as re

ported to us, gave the mortgage in order to escape the threatened proceedings to recover the debt. But the proceedings were not threatened in case the mortgage was not given. The solicitor's letter demanded payment of a debt for a large part of which there never had been any promise to give a mortgage. Dr. Taylor had asked for a mortgage, such as had been promised, which was a mortgage to secure his money advanced. That mortgage Mrs. Ellis had refused to give; whereupon Dr. Taylor did what he had a perfect right to do—he demanded payment of all she owed him, for rent and medical attendance, as well as for money lent, and threatened an action if it was not promptly paid. Upon that the debtor did what she might have done with any other creditor who pressed for payment. She offered security for the claim and gave it. She obtained by the terms of the deed four and a half months' extension of time; but I do not gather from what is before us that that extension was arranged with any idea that it would enable Mrs. Ellis to pay the debt when it expired. On the contrary she explains that the period between November and April is the season when there is but little doing in her business.

There would, of course, have been this difference between her dealing with Dr. Taylor and a similar transaction with another creditor, that there had been the original promise to secure the doctor. That difference is, however, only material when the effect of *the promise*, as justifying the preference, is discussed. If the mortgage can be saved by referring it to the promise and treating the giving of it as merely the fulfilment of that promise, that is a matter distinct from the allegation of pressure. The desire to avoid the threatened action may have led Mrs. Ellis to offer to fulfil her previous promise, which she had before refused to fulfil, as it might have led her to offer security where there had been no previous promise; but, setting aside the consideration that the mortgage given was a different one from the mortgage promised, the evidence does not strike me as so far connecting the threat of the action with a

demand for the security as to create any strong impression that apart from the consideration of the effect of the promise, which I shall deal with more fully by and by, the preference can properly be said to have been obtained by pressure.

But in my opinion the doctrine of pressure is inapplicable to the statute we are considering. If a transfer of goods is made by one in insolvent circumstances with intent to give a preference, I do not find in the statute either by express declaration or by reference to principle, or to any intention of the Legislature deducible from the enactment, that the intent is excused or is less the object of the prohibition because it may have been induced by the importunity of the creditor.

When the case of *Davidson v. Ross*, 24 Gr. 22, was before this Court we had to consider the question of pressure in its application to the 89th section of the Insolvent Act of 1869, which avoided transactions made in contemplation of insolvency, whereby one creditor obtained an unjust preference over others; and we held that those two factors, namely, the contemplation of insolvency and the unjust preference, might exist, notwithstanding that the transaction was induced by pressure exercised by the creditor.

It was pointed out in the judgments then delivered that the doctrine had originated in connection with what was described in the language of the Courts, though not in any statute relating to bankruptcy, as a "fraudulent preference;" and that one element of the fraud was the voluntary character of the transaction, or its origin in the intention of the debtor who made a transfer of property to the preferred creditor; and that it was by way of negating this particular constituent of the fraudulent preference, that pressure on the part of the creditor was treated as effective. We held that no question of the kind arose in the application of the section we had then to construe, which said nothing of fraudulent intent, or of intent in any shape, and that therefore the doctrine was out of place.

The judgment of the Court was necessarily confined to the matter then in discussion, and would not govern the construction of a statute like that now before us which makes the intent material, though it does not speak of it as a *fraudulent* intent; but a careful reconsideration of the subject with the aid of some decisions not referred to in *Davidson v. Ross*, several of them being of later date, has led me to the conclusion that, with respect to this statute also, the doctrine of pressure is inappropriate.

I shall not retrace the steps by which in *Davidson v. Ross* the origin of the doctrine was explained, but shall content myself with referring to what was there said as shewing that when the Courts declared that the giving of a fraudulent preference was an act of bankruptcy, the transfer that was held to be fraudulent was one made voluntarily, or *ex mero motu*, by the debtor, and made, in contemplation of bankruptcy, for the purpose of preferring the creditor; that, in later times, when fraudulent preferences were forbidden by statute, whether by the use of the words "fraudulent preference" or some equivalent expression, the same line of decision as to what constituted a fraudulent preference was adhered to; and that even when the word *fraud* was dropped by the legislature, as in the Bankruptcy Act, 1869, s. 92, which merely spoke of a conveyance made *with a view of giving a preference*, the enactment was construed precisely as if the word "fraud" or "fraudulent" had been still expressed. This was the direct point in *Ex parte Tempest*, L. R. 6 Ch. 70; and that case was followed by *Ex parte Bolland*, L. R. 7 Ch. 24; and *Ex parte Topham*, L. R. 8 Ch. 614.

These cases, it will be noticed, were all cases in bankruptcy, and what the Courts did was to apply to the bankruptcy Act, which did not in terms confine its enactment to fraudulent transactions, the same construction as had been applied to what the Courts, without any statutory direction, and at a time not so far removed from the days when bankruptcy was regarded as a crime, had designated a fraudulent preference.

As far as I am aware, the character of a transaction as being fraudulent or not, depending on the question whether it was the voluntary act of the debtor, or done under pressure, or under some motive that negatived his volition, has only been treated as of consequence in England, in questions under the bankruptcy or insolvency laws.

I have not met with any English case where the doctrine had been applied under statutes such as 13 Elizabeth, c. 5, where *intent* alone—not defined as fraudulent intent—is dealt with. I believe all the cases will be found in the notes to *Twynne's* case, 1 Sm. L. C.

It has not been always so in this Province. In *Tuer v. Harrison*, 14 C. P. 449, and *Bank of Toronto v. McDougall*, 15 C. P. 475, the same clause of the statute now in consideration was construed on the principle afterwards applied in England, in *Ex parte Tempest* to sec. 92 of the Bankruptcy Act, 1869. In both cases in the Common Pleas the judgment of the Court was delivered by Richards, C. J., who gives the key to the view on which the judgments proceed in the following sentence which I read from 14 C. P. at p. 453: "The word 'fraudulent' in the English Act [6 Geo. IV., c. 16, s. 3] in my judgment can make no difference, for both by the Statute of Elizabeth and at common law it was a fraud to make a conveyance of property to defeat or delay creditors in the recovery of their debts."

Both of these judgments contain examinations characterized by the ability and care which marked all the judgments of the eminent Judge who delivered them, of the English cases on the subject of pressure, down to *Bills v. Smith*, 6 B. & S. 314, which is cited from 12 L. T. N. S. 22 and which was the latest case then reported; and, if the principle could properly be conceded that the operation of our statute ought to be tested by the rules acted upon in bankruptcy cases in England, it was established that the intent forbidden by our statute was negatived or condoned by proof of pressure.

The reasoning was, however, in my judgment, fallacious in two respects: first, in reading into the statute the word

“fraudulent” which the Legislature had not put there; and secondly, having thus assumed the necessity for fraud, in treating this fraud as involving the entirely voluntary or spontaneous nature of the act done, to which characteristic alone the doctrine of pressure had any application.

The Bank of Toronto v McDougall was decided in 1865. It is possible that if, at that time, the question had been argued in appeal a construction such as now commends itself to me might have been put on our statute. Even if the same test had been resorted to as that applied in bankruptcy, authority for holding that a grant might be fraudulent, and made with intent to defeat or delay creditors, notwithstanding that it was made under pressure, would have been found in such cases as *Smith v. Cannan*, 2 E. & B. 35, and *Young v. Fletcher*, 3 H. & C. 732.

I fear, however, that if the question had been up for decision in 1875, when we decided *Davidson v. Ross*, we should have hesitated to act upon the view I am now advocating, because *Ex parte Tempest*, in which judgment had then been pronounced would have seemed too strong an authority against it. That case was, it is true, in bankruptcy, and it was a clause of a Bankruptcy Act the Court had to administer. Our Courts might perhaps have thought that while, in some occult way, the spirit of the old doctrines touching volition and pressure may have pervaded the English Act, because it was a Bankruptcy Act, our statute which, though somewhat cognate, was not a Bankruptcy Act, might be unvexed by it. Yet, inasmuch as the language of the English section 92, if read without reference to former doctrines, is hard to distinguish from that of chapter 118 of the R. S. O., the phrase “with a view to give a preference,” and the other expression “with intent to prefer” being very much alike—the authority of *Ex parte Tempest* would in all probability have prevailed.

That case, however, has now been practically overruled by *Ex parte Griffith*, 23 Ch. D. 69, which was decided since the delivery of the judgment we are now reviewing. In it the Court of Appeal, consisting of Jessel, M. R.,

Lindley, L. J., and Bowen, L. J. broke away from the traditional construction which had been applied to section 92 in *Ex parte Tempest*, and read the section by the common sense rule of having regard to the words employed by the Legislature, and to those only. The judgments delivered by the three members of the Court will well repay perusal. I shall content myself with quoting a passage from that of Lord Justice Bowen :

"I should like to pause in the current of judicial decisions for the last fifteen years on the subject of fraudulent preference, and to take note, so to say, of the position in which the Court finds itself in relation to this subject. Everybody knows that originally there was no express statutory enactment in regard to fraudulent preference. But, from the time of Lord Mansfield down to 1869, the Courts considered that certain transfers of property were frauds upon the bankruptcy law, though there was no statutory enactment on the subject.

Then came the Bankruptcy Act of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference, and the Act uses very definite language. Now, what is the method which has been pursued by judicial decisions since? I think it is very unfortunate. I do not say that it has led to any wrong decision, but I think that it has had a tendency to draw one's mind away from the true question. The first thing which the Courts did was, to discuss the question whether the Act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old inquiries as to what were the deductions which followed from the adoption of this verbal equivalent. And so we have been drawn into questions of pressure and volition, and at length in the present case we have got into a discussion as to what is the motive of a motive, whatever that may mean. I think it is a wiser policy to go back, as I do, in a humble spirit, to the words of the statute, and, without discussing motives of motives, inquire whether the transaction was entered into with a view to give one creditor a preference over others."

In the case of *Ex parte Bird*, decided two or three months later, 23 Ch. D. 695, it was not necessary to exhaustively expound section 92. Lord Justice Bowen, however, added some observations confirmatory of the views he had expressed in *Ex parte Griffith*, and I do not understand the Lords Justices Baggallay and Cotton to have disapproved of the principle of construction which he laid down.

With these decisions before us we are at liberty to give effect to the plain language of our statute without fear of coming into conflict with rules, or supposed rules, of decision in the English Courts. The principle enunciated in the quotation I have read, and which was acted upon in the disposal of the case of *Ex parte Griffith*, is the same upon which we acted in this Court in *Davidson v. Ross*. It is only making the further application of that principle to the clause in discussion, to hold that the doctrine of pressure does not properly enter into the inquiry whether the conveyance in question was made with intent to prefer the creditor to whom it was given. In my opinion we ought to so hold.

The question of the previous agreement is a very different one. It is not disputed that if, at the time the promise to give security was made, the security promised could have lawfully and validly been given, the same security could afterwards be given in fulfilment of the promise. Mr. Gibbons urged that the Chattel Mortgage Act might be evaded by this postponement of the actual transfer—an objection which does not bear examination, because until the actual transfer is made there is no charge upon the goods.

It does not in any way appear that the taking of the security was postponed for the purpose of saving Mrs. Ellis' credit or any similar purpose. It seems simply to have been neglected, perhaps for the reason given by Dr. Taylor, that he was much occupied with his practice, and so let the matter slip. Had the delay arisen from design to aid Mrs. Ellis by giving a false appearance of freedom

from incumbrances, there would have been room for discussion such as may be found in the recent case of *Ex parte Hauxwell*, 23 Ch. D. 626, where very instructive judgments by the Lords Justices Lindley, Fry, and Baggallay, will be found. And had there been any suggestion in the evidence that the after acquired goods had been obtained on credit in order that the mortgagee might seize them, considerations of actual fraud would have arisen such as were in question in *Ex parte Reader*, L. R. 20 Eq. 763, which was cited by Mr. Gibbons.

I do not find that the evidence before us raises any question of actual conspiracy or intentional fraud; or that we can be aided by any reference to either the letter or the spirit of the Chattel Mortgages Act. The questions are only those which arise under the second section of chapter 118.

It may be open to question whether any particular kind of security could strictly be said to have been promised by Mrs. Ellis. The evidence speaks of the terms of the promise in a very general way. It was to be *on all her stuff*, or *on all she had*, but no time was fixed for giving it. Possibly as the promise is said to have been renewed when fresh sums were lent, down to perhaps the 4th October, when a sum of \$44 was advanced, it may not incorrectly be taken to have related to such goods as at the last mentioned date were within her power to convey. It never applied to goods which might be acquired after the giving of the security, and it never applied to any debt but the loans of money; the rent and other items were not included. It thus appears that while *some* security had been all along the subject of a promise, it was not this security; and one thing in which this security differs from that which was promised is the very thing that most strongly indicates the intent to give the forbidden preference, namely, the provision respecting the future acquisitions of goods.

I cannot see in what view of the promise in question it can be made available to support this mortgage.

for any sum less than that shewn to have been the stipulated consideration.

Rowntree v. Jacob, 2 Taunt. 141; *Peacock v. Monk*, 1 Ves. 127; *Leifchild's case*, L. R. 1 Eq. 231; *Mulholland v. Williamson*, 14 Gr. 291; *Hartopp v. Hartopp*, 17 Ves. 184; *McManus v. McManus*, 24 Gr. 118; *Craig v. Craig*, 2 A. R. 583; *Frail v. Ellis*, 16 Beav. 350; *Shank v. Coulthard*, 19 Gr. 324; *Winter v. Lord Anson*, 3 Russ. 468; *Squire v. Campbell*, 1 M. & C., at 480; *Fry on Spec. Per.* 349 were referred to.

January 22nd, 1884. SPRAGGE, C. J. O.—It can scarcely be considered an open question at the present day, whether evidence is receivable, to prove an agreement for a consideration not contained in a deed. Some language of Lord Hardwicke, in *Peacock v. Monk*, 1 Ves. Sen. 127, led at one time to some doubt upon the point; but *Clifford v. Turrell*, before Knight Bruce, V. C., 1 Y. & C. Chy. 138; and the same case in Appeal, 9 Jur. 632, has settled the law upon the subject. In the case in Appeal the previous cases were reviewed; and it was held that evidence was properly receivable of a further consideration not mentioned in a deed, in addition to the consideration stated; so as such further consideration be not inconsistent with that stated.

In 1875 the plaintiff was the owner of 100 acres of farm land being the half of a lot, of the other half of which the defendant was the owner. The defendant was desirous of purchasing the plaintiff's 100 acres, and approached, first the plaintiff's son-in-law William Greenaway, and then the plaintiff herself with that view. This was early in the month of April. The price asked by the plaintiff was \$80 an acre, Greenaway says that he first named that price to the defendant, who said that he would give \$75. At the plaintiff's house the plaintiff herself named \$80 an acre as her price; and her case is, that after some negotiation the defendant agreed to give \$75, together with \$100 on an account not material to the case. Mary Ann, wife of Greenaway was present on that occasion; and she and the

plaintiff, both swear that there was a concluded bargain then and there; and that the defendant was to get the papers drawn, and to pay the purchase money. This action is not, of course, brought upon that agreement. Still what passed is material as part of the dealing between the parties.

The defendant admits that the price asked was \$80, but says that he did not agree to give \$75. He says, after some hesitation, that he offered to give \$6000, \$60 an acre, for the place, and he probably did so at a later date in May, or June. He says that no bargain was made upon the negotiations in April, nor at any time before October. He says that he was several times at the plaintiff's house after the treaty in April; and I gather from the evidence of both the plaintiff and himself that something, but not anything definite, passed between them in relation to a purchase, in June. In that month he went to England and did not return to Canada till October.

The defendant in his evidence leaves it to be inferred that there was a simple disagreement as to price previous to his going to England; and that as he and the plaintiff could not agree, the negotiations between them dropped. He leaves out of his evidence that which from the whole evidence I think did occur, that after what passed in April whether it was a concluded bargain or not, he searched the registry office and consulted a solicitor Mr. Smart, upon the title; and that he thereupon called again at the house of the plaintiff, and told her that her title to the land was bad; that the heirs of one Wm. Marsh a brother of her husband were about to make claim to it, and that she might be turned out of possession, that he expressed regret and professed sympathy; and that the previous treaty whatever it amounted to, was by both parties considered at an end; though as the daughter thought the idea of sale and purchase was not finally given up. That this examination of title occurred early in the spring, probably in April, is confirmed by the evidence of the defendant's solicitor, Mr. Smart.

What the defendant says in relation to the discovery of defects in the plaintiff's title is this, that after returning from England, "before going out to see her (the plaintiff) and in looking over some of my papers, I found among them, some of the papers, a quit claim deed from all the Marshes to William and Ruliff Marsh, and then I went down. I still thought of purchasing the place, if it was possible to get it, because it made a ring fence of my farms; and I went down to the registry office and found that the abstract was not clear * * and I went out there and told her the title was not good, and I could'n't give no such sum of money as they asked, as there would be a great risk on my part." This reads as if the discovery as to title and the claim of the Marshes and the communication of it to the plaintiff, was for the first time in October, after the defendant's return from England; whereas in fact all this occurred, except perhaps the discovery of a quit claim deed in the preceding April.

It cannot be said to be immaterial whether there was an examination of title in April, a searching of the registry office at that date by the defendant, inasmuch as it is just what is ordinarily done after an agreement of sale and purchase, and so tends to corroborate the plaintiff's statement; and I apprehend that the defendant was astute enough to perceive this, and that his ignoring this searching of title in April, and placing it in October, may thus be accounted for. If, on the other hand, we account for it by assuming that his memory was treacherous, not only as to dates, as to which he says himself that it is very bad, but also as to other facts, then an agreement in April to give \$75 an acre may also have slipped his memory; and this is really not very improbable looking at the fact that any bargain that may then have been made fell through, and taking into account the nature of the avocations of the defendant, and his absence from Canada.

There were two meetings after his return between him and the plaintiff before the day on which the deed was executed. At the first the defendant was accompanied by

Mr. Smart. Mr. Smart's understanding was, that the defendant's offer was of \$5,000 for the whole purchase money, the defendant taking the risk of the title. Mr. Smart says this; after speaking of threats current in the streets that the Marshes were threatening to bring suits, these difficulties were alluded to, "and of course Hunt pressed them pretty strongly, and said he did not want to buy a law suit and pay full price for it, and he said there was some conversation of the nature, that if she would in some way leave the money for security until the title was established in some way. It appears they had been twenty years in possession, nearly twenty-one years. My impression is, that his offer was the whole of the money, but she objected to that; and finally, he saying that he didn't want to buy a law suit, and that he was not going to pay full price for land that he might be called upon to pay more than half of it again to the other branch of the Marsh family; that he would not buy it, and give more than \$5,000. He seemed to stick pretty closely to that: that he didn't seem disposed any way about it." The evidence reads as if given in a fragmentary sort of way. This at any rate is apparent from it that the "full price" spoken of was not \$5,000, but some larger sum which the defendant suggested might be left by way of security until the title was cleared up, and it does not appear that the plaintiff had ever receded from her price of \$7,500. It is not a violent inference that if the title had been clear that would have been the full price for the land. The plaintiff's reason for requiring a down payment of \$5,000, and being content with it as a payment on account, was explained on the same occasion, viz., that she had in view, the purchase of a farm in Darlington, the price of which was \$5,000; or that sum had to be paid down, on account of it—Mr. Smart forgets which. The parties came to no conclusion upon that occasion. The bargain that was made was made subsequently at a meeting at which Mr. Smart was not present. No explanation is given why more than twenty years possession should have been considered necessary to

extinguish the right of the heirs of Wm. Marsh. As far as we see it was a mistaken idea of Mr. Smart. No suit has been brought, and the title of the plaintiff seems to have been perfect at the time that these difficulties were made about it.

All that I have so far commented upon has been preliminary to that which is the real question, viz., what was the final agreement between the parties after the meeting at which Mr. Smart was present. It might be that the plaintiff accepted the defendant's terms, \$5,000 for the place however the title might turn out, or a modification of it, \$5000 as a down payment, the defendant retaining in hand \$2500 to answer any claims that might be made by the heirs of Wm. Marsh. The evidence of the plaintiff, and of another daughter, Margaret Jane Rowe, is very distinct and positive, that it was the latter, and they give in their evidence many particulars of what passed on that occasion; among other things, that the plaintiff asked that the defendant's engagement should be put into writing, and that his answer was, that his word was as good as his bond, that this arrangement should be kept quiet; that he promised that he would settle with the claimants for as small an amount as possible, naming two specially with whom for reasons that he gave, he expected to settle for small sums; that he expected to have at least \$500 out of the sum that he retained, to give to her after settling with the claimants.

All this is only consistent with such an agreement as is set up by the plaintiff, and it is all sheer fabrication, unless there was such an agreement, all deliberate invention, a conspiracy by these two women to invent a story for the purpose of fraud, to invest it with circumstances, which they say occurred, and to support it by false swearing.

On the other hand the plaintiff's case is not without its difficulties. The plaintiff places what occurred, and at which Margaret was present in June, Margaret herself places it in October, shortly before the execution of the

deed, and I think if it occurred at all, it occurred at the latter date. The plaintiff indeed speaks as if something to this effect occurred twice, once in June, and again in October, and that it was on the first occasion that Margaret was present. I should say from the evidence that it did not occur in June in the presence of Margaret. It may have occurred in October in her presence, and she swears that it did. Both agree as to *what* passed, but differing in their account of *when* it passed. The plaintiff also seemed confused as to which daughter was present on this occasion. The evidence seems to leave it uncertain whether her naming Mary Ann in that connection, was a *lapsus linguae*, or a misrecollection. I incline to think the former. It might possibly be a forgetfulness of part of a concocted story, but the learned Judge does not seem to have thought so.

A further apparent difficulty is, that if the claim of the heirs of Wm. Marsh should prevail, the defendant might get only a moiety of what he purchased, and that such an agreement as is set up is improbable. But it is not denied that the defendant was willing to give \$5000, and run that risk ; and it is not improbable therefore that he considered \$2500 quite sufficient to buy off the threatened claims.

Another difficulty is, the frame of the deed and what occurred at its execution. As to its frame: Mr. Smart received his instructions from the defendant, and it was not intended that any consideration should be expressed other than was expressed. The plaintiff therefore would make no objection on that score ; but it is said that she insisted on the insertion of a provision as to the balance of rent accruing due. That is so, but then it was a special provision that she had stipulated for, as she particularly desired to have the \$5000 intact to apply on the purchase of another farm.

Apart from these difficulties which are entitled to all due weight, but which do not strike me as particularly formidable, there is nothing but the evidence of the defen-

dant himself, opposed to the evidence of the plaintiff, of her daughter Mary Ann, and of William Greenaway, upon some material points in the case, and opposed to the evidence of the plaintiff and her daughter Margaret Jane upon other material points. I do not think that the evidence of Mr. Smart assists the plaintiff's case. From a mere perusal of the defendant's evidence, I should not place very much reliance upon it. The learned Judge who tried the cause has put out of view the evidence of Sculthorp for the plaintiff, and of the defendant's father for the defendant. If both were to be looked at, I should, from reading them, consider the evidence of Sculthorp of much more weight for the plaintiff than that of the defendant's father for the defendant. But, putting both out of the case, we are asked to say that the learned Judge who tried the case, before whom all the witnesses were examined, and who is a better judge than we can be of the value of their evidence, was wrong in his conclusion that the evidence of the plaintiff and of the other witnesses who supported her case was truthful. It was either truthful or wilfully false, either truth or perjury: there is no middle term. I am unable to say that he was wrong in his conclusion, and the circumstances do not necessarily, or I should say even with any great probability, lead to any other conclusion.

In my opinion therefore, the appeal should be dismissed.

BURTON, J. A.—The first objection raised by the counsel for the appellant to the plaintiff's recovery, was, that the parol evidence was not receivable to shew a consideration different from that expressed in the deed, that although it is established as a settled rule of law that you may go out of the deed to prove a consideration that stands well with that stated on the face of the deed, you cannot be allowed to prove a consideration inconsistent with it, and that it was in contradiction of the instrument which states the consideration to be \$5,100, to shew that in fact the true consideration was \$7,600. It is generally laid down, and was expressly stated by Knight Bruce, V. C., in *Clifford v.*

Turrell, 1 Y. & C. C. C. 138, that it is not in contradiction of the instrument to prove a larger consideration than that which is stated. In that particular case, however, I can understand that the evidence of a further consideration was properly received, as it was not inconsistent with that stated in the deed itself, and it would, I apprehend, be clear that where a nominal consideration is mentioned, the evidence of a substantial consideration not expressed in the deed would be receivable, for the nominal amount might be considered as no consideration at all, for the purpose of the present question.

But if the question for consideration was confined to the one point, whether where a substantial money consideration is mentioned in the deed the parties could go out of the deed, and prove that in truth there was a larger money consideration, and seek to recover the difference, I should require further time for consideration.

In the case referred to the additional consideration was not only not inconsistent with that stated in the deed, but it was received upon a principle which of late years has been fully recognised, viz., that the plaintiff had in that case objected to execute the assignment until a collateral promise had been made to him, to allow him an annuity of £40 a year, and a house worth £10 a year.

Here the evidence may be receivable on similar grounds that whilst the present consideration was \$5,100, there was a collateral agreement, that upon a certain contingency a further sum of \$2,500 was to be payable, or so much of it as had not upon that contingency happening been expended in buying off the claims of certain parties alleged to have some interest or estate in the property.

But when a plaintiff comes into Court, in the face of a deed executed and acted upon for years, to establish that such an agreement in fact existed, it is not too much to expect that the evidence of its existence shall be of a clear, satisfactory, and convincing character, or as well expressed by the late Chief Justice of this Court, "He may well be required to justify the action of the Court in his favour by

bringing forward clear, distinct, and precise testimony, by presenting a case not resting upon a very nice balance of conflicting statements, by producing, in short, proofs, little if at all inferior to a written document in their efficacy."

Was the evidence adduced in this case of that character? I confess it does not so impress me, and the learned Judge commences his judgment with an expression of regret that the parties to the litigation had not come to some arrangement, inasmuch as whatever conclusion he might arrive at upon the evidence, "would still leave him in considerable doubt as to the accuracy of it."

The plaintiff in her original statement of claim sought to recover only \$2,000, which, however, is explained by her solicitor to have been his error, but she bases her claim at that time upon a request of the defendant to forbear pressing for it until the defendant should have a reasonable time to examine into, and satisfy himself of the goodness of the plaintiff's title to the land, and, in the words of the claim: "accordingly, the plaintiff, though she knew her title to said land was perfectly good, as the plaintiff asserts that it was, did not then press the defendant for the payment of said balance, which, together with interest thereon from the date of said sale and conveyance, still remains due payable and unpaid, and the plaintiff claims a lien on said land for said balance of said purchase money and interest.

"The plaintiff charges, and the fact is, that the defendant has had a reasonable time, and more than a reasonable time, to examine into and satisfy himself of the goodness of the plaintiff's title to said land, and the plaintiff further charges that all times have elapsed, all conditions fulfilled, and all things have been done by her to entitle her to be paid said balance and interest, which she has frequently, before the commencement of this action, demanded from said defendant, and which the defendant has wrongfully neglected and omitted to pay."

The defendant put in an answer to this claim, which, though not setting up some of the matters sworn to by the defendant at the hearing it is only fair to say, was put in upon the instructions of his father, he himself having been

served in England, and not having returned until a day or two before the trial.

The plaintiff then amended her statement of claim, and she then states it in this way :

“During the negotiations for said sale and at the time of said sale and conveyance, the defendant pretended and affected to believe that the title to said land was not entirely perfect, and that there appeared to be some defect thereto inasmuch as (as the defendant then pretended), it appeared by the Registry Office in which the title to said land was registered, said title being a registered one, that the heirs at law of the late William Marsh, a brother of the said Ruliff Marsh, since deceased, and who as the plaintiff is informed had jointly with her said late husband Ruliff Marsh, many years prior to said sale and conveyance, held said land as tenants in common thereof, had or might make a claim to some part or interest in said land, and the defendant pretending to believe that if he completed the purchase of said land, and accepted the conveyance thereof, and paid the said sum of \$7,000, the full amount of said purchase money, he might sustain loss or damage in case said heirs should thereafter make a claim to said land or any part thereof, requested the plaintiff to allow the defendant to retain in his hands the sum of \$2,500, a part of said purchase money, to meet and answer any possible claim that said heirs might make to said land or any interest therein ; and the plaintiff though feeling, believing, and having no doubt that the title to said land was perfectly good, and that no such claim or any claim could be successfully made by said heirs to said land, yet being urged and pressed thereto by the defendant, who pretended to be a friend of the plaintiff, finally consented and agreed with the defendant that he might retain in his hands said sum of \$2,500, for the purpose of meeting and answering any possible claim that said heirs might make or assert at any time before or upon the death of the said late Ruliff Marsh, who for many years prior to said sale, had been in delicate health, and at the time of said sale was an invalid, and not expected to live more than two or three years at most, and that in case said heirs should not make a claim to said land, which defendant would be obliged and liable to meet and answer before or upon the death of the said Ruliff Marsh, the defendant would then pay to the plaintiff said sum of

\$2,500, so retained by the defendant as aforesaid, for the purposes aforesaid."

She also states that she desired this to be put in writing, but on the persuasion of the defendant, and having full and implicit confidence in him, consented to waive it.

The plaintiff was examined before the hearing, and says that in the spring of 1875 she spoke to her son-in-law about selling the place, and in consequence of something he said to defendant the latter called upon her.

She states that at that interview, her daughter **Mary Ann** being present, she offered him the place for \$80 per acre, and that Hunt then wanted her to accept \$75, but that he afterwards consented to give \$76.

It was a concluded bargain she says at \$7,600. That in a day or two he came back, and said the title was not good. He came back in about a week, but she is unable to recollect whether it was then or afterwards that he would not give over \$5,000, but he said he would give \$2,500 more if there was no claim put in by the Marsh boys at her husband's death.

On this last occasion **Margaret Jane** was present, and no one else, but she says no bargain was concluded. But she says, on a subsequent occasion, the same **Margaret Jane** being present, he said he would give \$5,100, and that she agreed to accept that if he would pay the balance if there were no claims put in afterwards.

It is to be noted here that on her examination at the trial she at first says it was **Mary Ann**, not **Margaret**, who was present, but after the adjournment she corrected this statement, and said she thought it was **Margaret Jane** who was present, and although when asked on cross-examination whether some one had not in the interval called the matter to her recollection she at first denied it, she subsequently admitted that her son-in-law had reminded her that she had made a mistake in the name.

There is a singular similarity in her version on each occasion, of how the addition of \$100 to the price proposed came

about. At the first interview she says, that the defendant said the property was not worth more than \$75, and she said that she must have more than that, and "he concluded of his own self he would give me \$100 more."

In reference to the \$5,000 offer. Her account of it is this: "He said he couldn't give me over \$5,000. Well, says I. Then he concluded to give me \$100 more." She does not know that she said anything more, but he said, at Mr. Marsh's death he would give me the other \$2,500, if these Marsh boys didn't put no claim in, I would get my other \$2,500, and I asked him for writings, and he says, Mrs. Marsh, he says, there is no need of writings, my word is as good as a bond, and I took it to be so, I took him as my friend as he pretended to be." She is unable to fix the date but she says it might be two or three weeks or two or three days before the deed was signed.

It strikes one as rather singular that he should at this time be willing to give the additional \$2,500, when according to her evidence, about a month or six weeks after the first interview, he had called and said he could not give more than \$6,000. She says he afterwards called and then said he could not give me more than \$5,000, for the times were so poor; and she does not think he called again until the deed was signed, and that neither of the daughters was present upon either of these occasions.

Having once fixed the date at two or three weeks or two or three days before the deed was signed, she afterwards says it was in the summer, she thinks in June; that it was in her kitchen and Margaret Jane was there.

"A. He said he could not give me as much as he promised. He would give me \$5,000, and then I said you can do better than that, and he said he would give me another \$100, and then the remainder at his death, the \$2,500, what would be left out of the \$7,600—he would give it to me at Mr. Marsh's death, if there was no claim made, but he would try and save me what he could any way, and he would pay him off as well as he could."

And after having mentioned these as the only occasions on which anything was said, upon being asked whether she did not write it down, she says:

"I couldn't forget it, because it was said to me so many times. I couldn't have forgotten no way in the world. I can't forget an agreement like that."

I now proceed to extract from her evidence, with the view of shewing how greatly it falls below the description of evidence which it has been said should be required, where it is attempted to shew an additional consideration to that in a sealed instrument.

"A. Who said it to you so many times? A. He said it. Q. You have proved he said it once? A. He said it to me often times, at any time he came, that I would get it. Q. He told you at other times about this? A. I don't know whether he did or not. Q. You said he said it to you so often, that you couldn't forget it. You told me it was said to you on this occasion in month of June, and will you swear he promised you any other time to pay you \$2,500? A. No I don't know as I could swear. Q. Then he never did tell you at any other time that he would give you \$2,500 except on this occasion when Margaret Jane was there? A. I think he did more than that. Q. When did he do it? A. He must have done it in the meantime when he came there. Other times when he came there. Q. But the bargain, you say, was made this time, when Margaret Jane was there? A. Yes. Q. And do you mean that he had told you this before the making of the bargain, or after the making of the bargain? A. After. Q. How many times did he tell you, do you think, after the making of the bargain, that he would give you this \$2,500? How many times do you think? A. He must have told me more than once, but it was some time. Q. That is on this occasion, when Margaret Jane was there? A. Yes. Q. How many times did he tell you he would give you this, that day Margaret Jane was there? A. I think he told me twice he would give it to me, and I asked him for writings, and he said, Mrs. Marsh, there is no need of giving you writings, for my word is as good as my bond. Q. That was on the same occasion? A. Yes."

And then again, after fixing this as the last conversation, and in June when Margaret was present, she says, he came once to her again and said, "he would not give me more than \$5,000, because the Marsh boys would be putting in their claims, and if they did not, why of course she would get it, and that nobody was then present."

So that the bargain made in June, when Margaret was present, was for \$5,100, whilst that in October was for \$5,000, and \$2,500 on the husband's death.

This is not a very intelligible story, and one's faith in it is not greatly increased by the additional circumstance that she swears that there was an understanding that it should be kept quiet. Now how does this evidence agree with that of the daughters?

Mary Ann says that she was present only on two occasions, when the defendant first called, and when he called a few days afterwards, and said the title was no good. And she says that he was there in October, about a week before the deed was signed, but she was not present at the interview, but heard from her sister, who she says was present, that the defendant had then decided to give a writing to secure the \$2,500. But this witness makes an additional statement, that at the first interview, after some negotiation as to the price, when he had finally consented to give \$76 an acre, it was agreed that the half year's rent should be added, making the price \$78 per acre, a matter not referred to by her mother.

Margaret says she was only present at one conversation, and that was on the last occasion, a few days before the deed was signed, and he then said he could not give her as much as he said before. He could not give her more than \$5,000, at which the mother appeared to express surprise, and said that she did not know that the young Marshes had any claims, but she says that eventually they agreed upon \$5,100 and that he should settle with the Marshes for as little as he could, and try to save the plaintiff \$500 any way out of it if he could.

If this witness's statement be true, then the statements made by the plaintiff, that a few days after the first interview the defendant referred to the defects in the title cannot be, because she says that he opened by saying that he could not give the price he had offered, of which she was long since cognizant if her evidence is to be relied on; but the evidence of this witness is, to my mind, very unsatisfactory, at one time she narrates the conversation in this way: "I can't give you \$5,000, and she said, why how is that?"

Again, she states it, "I can't give you what I said, I can't give you only \$5,000 • * and on her saying that that was not enough anyway, when he replied, I'll tell you what I'll do, I'll give you \$100 more now, and settle with them for as little as I can."

If this case had rested here without any opposing evidence, I should have shared the doubts of the learned Judge as to the accuracy of a conclusion in favour of the plaintiff, based upon it; but here we have not only the defendant's sworn denial but the evidence of Mr. Smart that the plaintiff was very positive in exacting the insertion in the deed of the exception as to the rent and of the requiring the note, whilst no allusion whatever is made to this large sum.

The defendant states that he was applied to by the witness Greenaway, the son-in-law of the plaintiff, and in consequence called upon her and admits that she asked \$80, but that he made no offer but referred to a recent sale at \$60, and he thinks it not unlikely that shortly afterwards he may have offered \$6,000, he thinks he did, and she refused it. He says he may have seen her in June but made no offer, and sailed for England about the middle of the month, not returning till October. He then states that he found some papers relating to the property, shewing that the title was in William and Ruliff Marsh, and that he then searched the registry office and found no conveyance from William. He then consulted Mr. Smart, and told the plaintiff that he would not under these circumstances, give the price he had formerly offered, would not give more than \$5,000, which so far agrees with the plaintiff's statement, but he denies *in toto* the promise as to the \$2,500, and he says the only remark she made was "If you don't have any trouble, will you give me something?"

Now the statement of the defendant, borne out as it is by the evidence of Margaret, that shortly before the execution of the deed he told the plaintiff that he could not give as much as he said before but could only give \$5,000,

is quite consistent with his evidence, of what had taken place previously, when he admits having offered \$6,000, and is quite at variance with the plaintiff's admission that he had offered \$5,000 in June.

Even if there is any truth in the statement of what occurred at the first interview when according to the plaintiff's evidence he offered \$7,600, and according to Mary Ann Greenaway's evidence he offered \$7,800, it is admitted by the plaintiff that he had withdrawn that offer and offered only \$6,000. If therefore he said he could not give what he formerly promised, according to the evidence on both sides, that was only \$6,000 not \$7,500 ; whereas if Mrs. Marsh's evidence is to be accepted, if it was a reduction at all, it was only a reduction of \$100 from the offer she says was made in June.

Again, Margaret does not in her first version of what occurred state anything about a balance of \$2,500, but says that he increased his offer to \$5,000, and that he would settle with the Marshes for as little as he could. She afterwards amends this by stating that he said : " I will try and save you \$500 any way out of it if he could."

The expressions used by mother and daughter, that he was acting as a friend have a suspicious resemblance, and when read with the mother's statement that she disdained such characters as showmen and rope-walkers, are somewhat inconsistent.

The learned Judge does not discredit the defendant, nor was any attempt made at the hearing to shew that he was an untruthful person, and as printed the evidence does not involve any self contradiction, but appears to me to be much more probable than that presented on the part of the plaintiffs, even if that evidence had been free from the contradiction and uncertainty I have endeavoured to point out. It does not appear to me therefore, that any such question arises here as is sometimes so embarrassing in dealing with questions of fact ; the question is not, whether more or less credit was given by the learned Judge to particular witnesses depending upon the manner

in which that evidence was given before him, but depends upon another rule to which I have adverted in an earlier portion of the judgment, viz., whether the plaintiff has satisfied the onus that was upon her, of shewing in the face of the sealed instrument, and her particularity in insisting upon its correction in order to secure the \$200 rent, the requirement of the security for the \$100, and the contradiction between the original and amended claims, that her claim has been made out with that certainty which Courts ought to exact under circumstances like the present. If injustice is done in holding her disentitled to recover, she herself is to blame in not having the agreement reduced to writing, and, for my part, I think it far safer to run the risk of a possible injustice than to unsettle the law and encourage actions like the present when so strong a temptation exists to misstate facts, and when all difficulty might have been avoided by reducing the agreement to writing, apart altogether from the length of time which was allowed to elapse before the bringing of the suit.

The fact that the learned Judge entertained a doubt at the close of the case shews, I think, that the plaintiff had not satisfied that onus; and it would, in my opinion, be establishing a very dangerous precedent were we to hold her entitled to recover upon this evidence.

But, as my learned brothers think it a case in which we ought not to interfere with the decision of the Judge upon the facts, the appeal will be disallowed.

PATTERSON, J. A.—I do not dissent from the judgment dismissing this appeal, which is the consequence of leaving undisturbed the decision of the learned Judge who tried the action upon the very conflicting evidence with which he had to deal.

Assuming the admissibility of parol evidence to shew a consideration beyond that stated in the deed, which is concluded by the case of *Clifford v. Turrell*, 1 Y. & C. 130; 9 Jur. 634; the question is entirely one of fact, and

the argument against the judgment has necessarily been little more than a discussion of the credibility of witnesses and of the weight of evidence.

My impression is, that if I had been trying the action I should have held the written instrument effectual to turn the scales in which the conflicting evidence was balanced. The plaintiff fully understood what was in the deed, and had an addition made to it for the purpose of making sure one part of what she claimed. It is not pretended by her, and the contrary is proved, that a word was dropped by her, or her son-in-law, or any one else, either when the deed was executed or when she received the payment of the \$5,000, for which she took no one's word, but retained the executed deed till she got the money, to the effect of anything more being due to her. No document could possibly be put in evidence with greater claims to credit as expressing just what the parties meant to express than this deed, and the whole case is calculated to make one appreciate the wisdom of the Statute of Frauds, and regret its virtual abolition by the decisions which, in cases like this, permit oral evidence of an alleged agreement for the sale of lands. In the same scale with the deed there would be considerations of discrepancies and improbability which impress me against the truth of the plaintiff's story much more strongly than they appear to have impressed the learned Judge, but on the other side there are counter considerations which were for the Court of first instance to deal with, and some of which tend in my mind to induce the belief, that however the real fact may be as to the bargain between the parties, the defendant, if he agreed only to what the deed expresses, drove a hard bargain with the plaintiff, who was unequally matched with him; and that he may not after all be paying an excessive price for his purchase, or more than he would have agreed to pay if he had not made the discovery concerning the other family of Marshes and their possible relation to the title, which he made use of to reduce the price he was to pay, but which did not affect the intrinsic value of his purchase.

MORRISON, J. A., agreed with the views expressed by his Lordship the Chief Justice, and concurred in dismissing the appeal, with costs.

THE VICTORIA MUTUAL FIRE INSURANCE COMPANY OF
CANADA V. JAMES THOMSON.

Mutual Insurance Company—Assessment to meet losses incurred or notes of the company given prior to policy holder joining the company—Assessment illegal in part—Notice.

Held, that an assessment for the purpose of paying promissory notes given by a Mutual Insurance Company must be confined to the premium notes or undertakings current at the time the loss occurred in respect of or to meet which the company's notes were given. New members cannot be assessed to pay notes given previously to their joining the company.

The directors of the plaintiff company assessed the defendant, a policy holder, for several sums, one of which was illegal, and they sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum. *Held*, that the plaintiffs were not entitled to recover any of the assessments.

THIS was an appeal by the plaintiffs from the judgment of Cameron, J., pronounced 13th May, 1882, whereby he determined that the plaintiffs were not entitled to recover from the defendant the sum of \$42, being the amount of a special assessment made on the 22nd of September, 1880; and that the plaintiffs were not entitled to recover the amount paid for re-insurance to their General Branch. There was also a cross-appeal by the defendant from that portion of the same judgment which found that the plaintiffs were entitled to recover from the defendant the sum of \$31.92 part of other assessments for \$40.88 in all, made by the plaintiffs on the defendant between the 7th of June and the 27th of December, 1880.

The statement of claim set forth (1) that the plaintiffs were a Mutual Fire Insurance Company doing business as such, under and subject to the Acts relating to Mutual Fire Insurance Companies in Ontario.

(2) That on the 7th June, 1879, the defendant became a member of the company, and their policy No. 4617 was

duly issued to the defendant, insuring him against loss of certain property for three years to the extent of \$3,500; and thereupon, and in consideration thereof, the defendant gave to the plaintiffs his undertaking in the words and figures following:

"\$168. Toronto, 7th June, 1879. I hereby undertake to pay the said Company, at their office in Hamilton, whatever assessments the Directors may from time to time declare to be required, not exceeding in the whole the sum of one hundred and sixty-eight dollars. JAMES THOMSON."

(3) That assessments on such undertaking were duly made by the directors of the company as follows, namely: on the 22nd September, 1880, for the sum of \$42, and for sundry assessments made between 7th June, 1880, and 27th December, 1880, inclusive, amounting to the sum of \$40.88, of which assessments the defendant had due notice before the commencement of this action.

The plaintiffs also claimed interest on the said sums of \$42 and \$40.88.

The defendant by his statement of defence set up (1) That the directors of the plaintiff company did not make the assessments as alleged.

(2) That the alleged assessments were not made by any person or body duly competent, or having power to make the same.

(3) That the alleged assessments were made for purposes other than those for which the plaintiffs were authorized by their Act of Incorporation and by-laws.

(4) That the Acts under which the plaintiffs were incorporated empowered them to divide their business into branches or departments, and required the directors to make a scale of risks for each branch, and to direct the accounts of each branch to be kept separate and distinct the one from the other; and provided that members of said company insuring in one branch should not be liable for claims on the other branch. That such accounts had not been kept separate and distinct, and that the alleged assessments had been in whole or in part for claims on the branch or branches other than the one in which the defendant was insured.

(5) That the alleged assessments were not necessary to meet the losses and expenses of the company during the currency of the said policy, but were for losses and expenses incurred prior to the date of said policy.

(6) That the defendant had been always ready and willing, and before action offered the plaintiffs to pay any sum which he might be justly called upon to pay to meet claims arising during the term specified in his policy, without regard to whether the assessments were formally made or not, if the plaintiffs would render to him a statement shewing the amount of such liability: but the plaintiffs neglected to furnish any such statement, and the defendant could not ascertain what sum (if any) he was liable to pay.

The grounds of the defendant's cross-appeal were:

(1) That the said assessment included interest on moneys borrowed before the date of the defendant's policy.

(2) That the assessment being for sums not legally demandable from the defendant was illegal.

(3) That no notice of any valid or legal assessment was ever sent to the defendant; the notice sent being a notice to pay a sum which the defendant was not liable to pay, could not be a compliance with the statute. (*Per WILSON, C. J. in Chamberlain v. Turner*, 31 C. P., page 472, where he defines a "demand" of payment to mean a demand of a claim, payment of which it was then right to require.)

(5) That there rested on the company the duty of making an assessment and giving notice for the proper amount, and not on the defendant of examination into the books of the company to ascertain if the assessment and notice were regular, and for sums which might be legally demanded.

(6) That if the policy-holders were bound in every case in order to protect themselves to inquire into the validity of the assessment and notice, no advantage would be gained by requiring the notice to specify the amount of the assessment. Moreover it would be impracticable for the policy-holders to protect themselves against carelessness, inefficiency, or fraud.

The other facts appear in the report of the case in the Court below, 32 C. P. 476, and in this judgment.

The appeal and cross-appeal came on to be argued on the 6th of February, 1884.*

Robinson, Q. C., and Bruce, for the plaintiffs. By sec. 29 of Ch. 161, R. S. O., the appellants are authorized to issue their promissory notes or debentures; and the two promissory notes to Lewis and McQuesten to pay which the special assessment of September, 1880, was made, are within the provisions of that Section; and "the whole of the assets, including premium notes of the Company, being held liable to pay the same," the directors must have an implied power and authority to make assessments upon such premium notes to provide for the payment of such promissory notes.

The directors have express power, however, under section 47 of the Act, to make such assessment; and while the power to assess members for the sums necessary to pay notes contained in C. S. U. C. cap. 52, sec. 61, is not repeated in the same terms in the Revised Statutes, cap. 161, the provisions of sec. 47 and of sec. 29, which are not in the Consolidated Statutes, are sufficiently large to confer that power.

The respondent was liable to be assessed upon his undertaking for the sum which the directors determined to be necessary to pay the two notes to Lewis and McQuesten, and such assessment was duly made and due notice thereof given to the respondent to entitle the appellants to maintain an action therefor, and judgment should have been given in favour of the appellants for the sum of \$42.00 and interest from 22nd September, 1880.

It is established in evidence that the respondent had notice before giving his undertaking, of the existence of the notes in favor of Lewis and McQuesten, and in becoming a member of the Water works Branch of the Company he was assuming his proportionate part of the liabilities thereof.

**Present*, SPRAGGE, C.J.O., BURTON, PATTERSON, and OSLER, JJ. A.,

They also contended that the Company having re-insured in their General Branch a portion of the insurances which had been effected in the Water-works Branch on the cash premium plan, they were entitled to recover the amount paid for such reinsurance, and were entitled to judgment in this action for the further sum of \$3.08 together with interest on the sum of \$40.88. *Duff v. Canadian Mutual Insurance Co.*, 27 Gr. 397, 7 A. R. 238; *Orr v. Beaver Mutual Insurance Co.*, 26 C. P. 143; *Green v. Beaver Mutual Insurance Co.*, 34 U. C. R. 78.

J. H. Macdonald and *J. R. Roaf*, for the respondent. The assessment of \$42.00, cannot be sustained, it being made for the purpose of paying notes given by the company in 1875 and 1878; before the respondent became a member of the company. These notes were renewed from time to time contrary to the provisions of the by-law of the company under which the directors claimed to act. This by-law passed in 1869, which gave power to make notes not extending for a longer period than one year, gave no power to renew; in fact the right of renewal did not then exist, and it provided that assessments to meet any notes to be given, should be made payable at a period before the maturity of such notes.

The Act 36 Vict. ch. 44, did not give an indefinite right of renewal. It is submitted that the effect of that Act was to give a right of renewal from time to time with a limit of twelve months, beyond which there could be no renewal. It is contrary to the whole scope of the Act to assess for a loss which occurred before the individual became a member. There is only the right to assess to meet losses of the company during the currency of the policy for which the undertaking was given.

The assessment of \$40.88 is bad. It includes sums for which the respondent could not be assessed, namely, for re-insurance in another branch, and also for interest on the renewal of the notes already mentioned. The assessment cannot be good in part and bad in part.

The statute requires a notice of assessment to be given,

which notice must contain certain information specified in the Act. There is no right of action until default is made in payment, after notice given in conformity with the Act. These provisions will be construed strictly as there is the right of forfeiture as well as the right to sue: *Beaver Mutual Ins. Co. v. Spires*, 30 C. P. 304; *Duff v. Canadian Mutual Ins. Co.*, 27 Gr. 391; *Orr v. Beaver Mutual Ins. Co.*, 26 C. P. 141; *Green v. Beaver Mutual Ins. Co.*, 34 U. C. R. 78; *Beaver Mutual Ins. Co. v. Trimble*, 23 C. P. 252; *Chamberlain v. Turner*, 31 C. P. 460, were referred to.

March 28, 1884. BURTON, J. A.—The defendant became a member of the company by accepting a policy in the Waterworks Branch on the 7th June, 1879, to run for a period of three years, giving the usual premium note or undertaking for \$168, and paying \$21 in cash, and he paid in the following year \$30.24, in full of all assessments ordered by the board for losses incurred from the date of the policy to the 7th June following.

On the 18th October, 1880, the secretary notified the defendant of an assessment of 25 per cent. on all premium notes in the Waterworks Branch in force on the 22nd September, 1880, for the purpose of paying the promissory notes of the company issued in respect of that Branch, the amount assessed against the defendant being stated to be \$42.00.

A further notification was posted to the defendant on the 22nd January, 1881, of "assessments" to cover losses and other expenditure of the company from the 7th June, 1880, to the 27th December, 1880, amounting to \$40.88, and stating at the foot of the notice that these assessments are in addition to the special assessment above referred to.

It would appear that a few days previously to the 27th December, 1880, the directors had met and decided to discontinue the business in the Waterworks Branch, and on that day this and all other policies in that branch were cancelled.

Those policies which had been effected in that Branch

upon the cash principle were re-insured for the remainder of the terms they had to run.

The last assessment, which, for convenience, I will call the general assessment, was for losses and other expenditure of the company accruing from time to time between the 7th June, 1880, and the 27th December, 1880, and also an assessment of $5\frac{1}{2}$ per cent. for the purpose of defraying the expense of re-insurance of the cash premium policies which on the discontinuance of the branch the directors determined to renew.

The two notes referred to in the special assessment were notes of \$5,000 each; one given in 1875, the other in 1878, and renewed from time to time; the interest being paid on the renewals and included in the assessments made in previous years.

They were current and about maturing when the special assessment was made.

The only by-law in existence in relation to the issue of notes was made in 1869, under the law as it then stood. The Consolidated Stat. c. 52 s. 57 as amended by 31 Vict. c. 32.

By the first of these enactments the directors are empowered, under a by-law to be passed regulating the manner in which such power shall be exercised, to make promissory notes for such sums and to such an amount as may be necessary for the purpose of paying any loss or losses sustained by the company, or of expenses, or for other purposes of the company; a wide departure from the previous Acts, which restricted the issue of notes to such amount as was necessary to pay the losses of the company.

The Act I am now referring to did, however, limit the amount to be issued to one-fourth the amount remaining due on the premium notes, and expressly provided that they should not in any instance be drawn so as to become due and payable in more than twelve months after the issue, and should be paid solely out of moneys to be collected on the premium notes and not by the issue of new notes.

And under section 61 of that Act the directors were empowered to assess upon members in proportion to the amount of their premium notes such sums as might be necessary to pay the notes so issued.

It is, I think, manifest that it was intended under this enactment that the assessment for the payment of these notes was to be confined to such premium notes as were current at the time that the loss or losses in respect of which they were issued occurred, but it is manifest that even under it, and even more so under the amendment sanctioned by 31 Vict., when the directors were authorized to renew the notes, an opportunity was given to transfer the liability from the members whose premium notes were current at the time of the loss to those who had become members subsequent to the loss, but pending the currency of the notes.

This would be contrary to the spirit and intent of the mutual system.

The by-law appears to be in strict conformity with the statute, though it does not go so far as the statute, but confines the issue to notes given for payment of losses, so that (the notes being thus confined and payable within a year) the enactment was not so much liable to abuse as when the power to renew was given.

The 31st Vict. authorized the directors to renew for any term not exceeding a year, but in express terms declared that the indebtedness created by the original notes should be paid off within two years from the creation of such indebtedness.

All the previous legislation in reference to mutual insurance companies was wiped out by the 36 Vict., c. 44, which, however, professes to be a consolidation and amendment of the laws previously existing, and the statute which relates to the powers to issue debentures or notes is much less restricted than in the previous enactments. It provides however still that the original notes shall be for a term not exceeding twelve months, and provides that the directors may renew the same from time to time for any

such term, which, I think, leaves the power of renewal as it stood under the 31st Vict. It certainly could not have intended to confer an indefinite right of renewal—so to construe it would be to restrict the renewals themselves to terms of twelve months, and prohibit renewals for a shorter period. What was manifestly intended was, that no original note should be given for a longer period than twelve months, and although a renewal or renewals are permitted, such renewals should not extend beyond an additional period of twelve months; so that, as in the former Act, the indebtedness created by the original note had to be paid off within two years at farthest from its creation.

This, however, in the view which I take of the present enactment is not of much importance, as I think it clear that the framers of the present law intended to avoid the injustice which, as I have pointed out, was likely to occur by assessing new members to pay notes given for losses previous to their joining the company. The power to assess for such notes therefore is omitted, and power taken to assess for losses and expenses, the payment of which the company have been enabled to anticipate by raising money on notes issued for that purpose. The undertaking by s. 41 is liable to be assessed for losses and expenses in manner thereafter provided. Sec. 43 gives power to the directors to assess for such sums as they think necessary to meet the losses and other expenditures of the company during the currency of the policies for which the premium notes were given, and in respect of which they are liable to assessment.

These and the 10 per cent. for the creation of a reserve fund are the only purposes for which the premium notes are liable under the Act of 1873 to be assessed.

It was contended that if the power to assess these notes is not continued under the present law we have presented to us the extraordinary spectacle of a Legislature authorizing the issue of notes or debentures which there is no power to enforce. It does not so strike me. The company

is fully authorized to assess for all losses as they occur, and for expenses, which would include the expenses of management and the discounts they might have to pay if they deemed it more prudent to meet losses as they occurred, instead of enforcing frequent assessments. The sums so assessed would properly be applicable to the repayment of the moneys obtained on loan for the purpose of meeting the losses in respect of which they were made. By this full effect is given to the words of the statute and full security to the party advancing the money, if the provisions of the law are carried out by the directors. If there are other assets, they as well as the premium notes are charged to pay the same at maturity; in other words, the assessments made on the premium notes current at the time the loss or expense was incurred, are impressed with a trust for the re-payment of the notes from the proceeds of which the loss itself had been paid. To extend the liability of a policy holder under this system to the repayment of notes given years previously for losses or expenditure with which he had no concern, would require very clear and explicit language; although I am inclined to think that such might have been the case as the law stood previously to the amendment in 1873.

Under the present law, as I think deliberately, the power to assess for the notes themselves is abolished, but the proceeds of the assessments made for losses become applicable to the payment of the notes given for the losses, or from the proceeds of which the losses have been paid.

Then as to the general assessment. I take it to be clear that the assessment of the premium notes for the purpose of re-insuring the policies on the cash premium system was invalid, and the question is simply whether an assessment which includes sums not legally demandable can be enforced at all.

The 48th section provides that if the assessment on the premium note is not paid within thirty days after the day on which the assessment has become due, the policy of

insurance for which such assessment has been made shall be null and void as respects all claims for losses occurring during the time of such non-payment, and the previous section provides that an assessment shall become payable in thirty days after notice has been mailed to the post office address of the member.

If no notice were sent it is clear there could be no forfeiture, and it appears to me that if the assessment or notice demands anything which the company had no right to demand, the forfeiture would be bad.

It has been held that where there is a condition of re-entry for non-payment of rent several things are required at Common Law to be previously done by the reversioner to entitle him to re-enter: (1) There must a demand. (2) The demand must be of the precise rent, for if he demands a penny more or less it will be ill: *Fabian v. Winston*, Cro. Eliz. 209; and (3) it must be made precisely on the day. And even where the forfeiture relied upon was under the terms of an agreement whereby it was agreed that if the tenant should make default in payment of the rent within twenty-one days after the same should become due, being demanded, it should be lawful for the landlord to re-enter, it was held that although the common law demand was dispensed with, still a demand after the expiration of the twenty-one days was required, and a demand within that period was insufficient, although the full period of twenty-one days had expired before action brought: *Phillips v. Bridge*, L. R. 9 C. P. 48.

Then, could it be bad for one purpose and good for another? The member has no means of ascertaining how the assessment is arrived at and avoiding the forfeiture by payment of the correct amount, and I apprehend that as far as the forfeiture is concerned the ordinary common law rule must prevail, that no forfeiture shall take place unless all conditions precedent have been strictly complied with.

But the Legislature has also in express terms made the giving notice of the assessment in the manner prescribed, a condition precedent to the right of action accruing, and

has required such notice to contain at least the following particulars: the number of the policy, the period over which the assessment extends, the amount of the assessment, the time when and the places where payable. The notice seems good upon its face, but it includes one amount for which the company had no power to assess; I refer to the re-insurance, and, as I gather from the evidence, a further sum which was also open to objection; I refer to the interest on these overdue notes.

To maintain the action it was not only necessary to shew a legal assessment but a notice of that assessment, which has not been done. I cannot agree that the defendant was liable to pay the portion that was properly assessed, or rather that portion of the amount which the company, had a right to assess, for that assessment has never been perfected by a notice or demand, and, so far as one can see cannot be very readily ascertained, as it includes interest on the notes in question and on borrowed moneys.

It has been said that if a landlord distrained for too much, that, whilst rendering him liable to damages, would not vitiate the distress for the rent actually due, which is perfectly true; but I apprehend that if the right to distrain was derived from an agreement, and the agreement contained a clause in it that no distress should be made until after the rent due had been demanded in writing, a distress without such demand would be void altogether, and the landlord liable as a trespasser.

The case would seem to fall within the principle of the cases in which it has been held that where the amount of a money demand alleged to be payable by one party to another depends on some fact known to the party making the claim and not to the other, notice to the latter of the specific sum demanded must be proved. Unless the correct sum is demanded, the debtor can make no tender so as to avoid the risk of costs: See *Brown v. Great Eastern R. W. Co.*, 2 Q. B. Div. 406.

I am of opinion, therefore, that the appeal on both points fails, and that the cross-appeal should be allowed, and judgment given for the defendant, with costs.

SPRAGGE, C. J. O., and PATTERSON, J. A., concurred.

OSLER, J. A.—I concur in the view taken by my brother Burton of the extent of the policy holder's liability to assessment upon his premium note, and of the construction of the 29th section of the Act. The plaintiffs' appeal from the judgment of my brother Cameron, should be dismissed.

As to the cross-appeal, the plaintiffs made a number of small assessments upon the defendant's note, one of them being for re-insurance in the general branch of the cancelled policies in the Waterworks Branch, and therefore illegal and *ultra vires*: *Beaver and Toronto Mutual Fire Ins. Co. v. Trimble*, 23 C. P. 252. They amounted in all to \$30.88, and one general notice, not distinguishing the separate assessments or the amounts, was sent to the defendant.

With great respect I think this was an insufficient notice, and that the plaintiffs are in consequence not entitled to recover any of the assessments in the present action.

By the 48th section of the Act it is declared that a notice of assessment shall be deemed sufficient if it embodies the number of the policy, the period over which the assessment extends, the amount of the assessment, and the time when and the place where payable.

Here the several assessments, including the illegal one, were lumped together in one notice, and a single sum demanded in respect of them all without distinguishing the amount of each.

The notice is quite as essential to the defendant's liability, as the assessment. Until a legal assessment has been made and notice given in the prescribed manner no debt arises. Non-payment of the assessment after a valid notice works a forfeiture of the policy: (sec. 48). Yet by the same section and section 51 the company may sue for and recover the same without waiving the forfeiture. The forfeiture and the right of action are on the same footing. Both depend upon the validity of the assessment, and the

sufficiency of the notice. There is no analogy to the ordinary case of distress for rent, which the landlord may justify to the extent of whatever he can shew to have been legally due to him. What that was the tenant is presumed to know and is bound to tender it at his peril. It is more like the case of a warrant for rates imposed under statutory authority. "If rates which are properly and formally imposed are joined in the same warrant with others irregularly imposed, and therefore not recoverable, and the amount of both is blended into one sum, a warrant is not sustainable for any part:" *Corbett v. Johnston*, 11 C. P. 317; *Hurrell v. Wink*, 8 Taunt. 369; *Sibbald v. Roderick*, 11 A. & E. 38.

The position of the policy holder with regard to an assessment is similar to that of a shareholder with regard to calls, which must be made, not only by the proper authority, but in the proper manner, in order that they may impose any obligation: *Lindley on Partnership*, 652.

The case of *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687, is much in point. The question was, whether the directors of the company could forfeit certain shares for non-payment of a call. The notice of the call was inaccurate in demanding payment of interest from the date of the call. Mellish, L. J., said: "Was that a good notice? I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs." Baggallay, L. J.: "The Legislature has thought fit to impose very heavy penalties for non-payment of calls on shares. Not only are the shares liable to forfeiture, but the shareholder can also be sued for the unpaid calls. The Legislature has pointed out all the steps which are to be taken previously to the forfeiture, and it is essential that all those steps should be strictly followed."

I observe that this was the view adopted by the learned Judge of the County Court of the county of Wentworth, in an action similar to the present at the suit of these plaintiffs.

I think, too, the plaintiffs must fail on another ground:

"The sum so imposed being of uncertain amount, in the sense that it would have to be ascertained by a reference to matters better known to the company than to the party in default, it must be demanded before proceedings can be taken for its recovery. It is one of those cases where, according to the principles of the Common Law, notice must be given to the party of the amount he has become liable to pay, inasmuch as he cannot be presumed to know it." *Brown v. The Great Eastern R. W. Co.*, 2 Q. B. D. 406 410.

For these reasons I think the cross-appeal of the defendant should be allowed.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,
CONTAINED IN THIS VOLUME.

**ACTION BY CREDITOR
AGAINST SHAREHOLDER.**

In an action by a creditor against a shareholder for unpaid stock, in a company incorporated under 32-33 Vict. ch. 13 D., *Held*, [BURTON, J. A., dissenting,] that the shareholder, under a plea that the injunction was obtained by fraud, was entitled to set up as a defense that the company had not in the original suit been served with process, under section 50, the person served as secretary not being such officer.

Per BURTON, J. A. Such an omission was an irregularity only which must be moved against promptly, and could not be the subject of a plea; but that fraud or collusion between the plaintiff and the company or its officers would avoid the judgment, and could be set up by plea, but was not shewn by the evidence here. *Harvey v. Harvey*, 91.

**ADMINISTRATOR PENDENTE
LITE.**

In an action instituted by the vendor of F. W. to set aside a will alleged to have been executed by him under undue influence, D. acted as her solicitor, and obtained a decree as prayed. During the pendency of such action one H. was appointed by the Court administrator with the view of getting in certain debts due the estate before being barred by lapse of time. Numerous actions were brought by D. in the name of H., in some of which moneys aggregating a large sum were recovered, whilst in many no benefit whatever resulted to the estate, and costs amounting in the whole to \$2,738 37 were incurred, which had been taxed as between solicitor and client, and were paid on H. passing his accounts before the Master to D. partly by H. out of moneys

of the estate, and partly by funds coming into D.'s hands as such solicitor and retained by him. Subsequently a prior will of T. W. was duly proved by the executors named therein, who took proceedings to obtain an account of H.'s administration and a taxation of D.'s costs. These proceedings finally resulted in a dismissal thereof as against D., and an order on H. to pass his accounts, which he did, charging the estate with the amount of costs so paid to D. but on a retaxation of D.'s bills the aggregate amount was reduced to \$725 56, it being stated that several of the bills had been disallowed *in toto*, on the alleged ground that the actions had been brought without the leave of the Court, and H. was ordered to pay in the difference. H. was unable to do so, and thereupon he, as also the executors, by their several petitions, applied for and obtained an order upon D. to repay the amount with costs, or in default be struck off the roll of solicitors. (29 Gr. 280.)

On appeal this order was reversed, [SPRAGGE, C. J. O., dissenting] the Court being of opinion that the taxation and all the other proceedings in reference thereto having been had in a proceeding to which D. was not a party, he could not be bound thereby.

Per SPRAGGE, C. J. O. Under the circumstances appearing in the matter an order to strike D. off the rolls in case of non-payment was not called for. *Wilson v. Beatty—In re Donovan*, 149.

ADMINISTRATION.

The effect of sect. 30 R.S.O. ch. 107, is to disable an executor from giving preference to one creditor over another,

so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; and if upon a final adjustment of the accounts of the estate it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, and that there is a deficiency of assets, such creditor will be ordered to refund at the instance of other creditors, the statute thus placing creditors and legatees in this respect upon the same footing.

Chamberlen v. Clark, 1 O. R. 135, affirmed. *Chamberlen v. Clark*, 273.

AFTER-ACQUIRED LANDS.

See WILL, &c. 2.

APPEAL.

See ARBITRATION.

APPEAL FROM ORDER GRANTING LEAVE TO APPEAL.

See LEAVE TO APPEAL TO SUPREME COURT.

APPROPRIATION OF PAYMENTS.

See TRUSTEE AND CESTUI QUE TRUST.

ARBITRATION.

Held, affirming the judgment of the Queen's Bench (46 U. C. R. 235) that an appeal will lie from an award made pursuant to a consent reference at *nisi prius* under sec. 205 C. L. P. Act. *McEwan v. McLeod*, 239.

ASSESSMENT ILLEGAL IN
PART.

See MUTUAL INSURANCE COMPANY, 2.

ASSESSMENT TO MEET
LOSSES INCURRED PRIOR
TO POLICYHOLDER JOIN-
ING COMPANY.

See MUTUAL INSURANCE COMPANY, 1.

AWARD UNDER RAILWAY
ACT.

Ch. 66, c. s. c.

Held, that the Canada Southern Railway, although brought under the jurisdiction of the Dominion before proceedings had been taken for expropriation, was still subject to the Railway Act then in force in Ontario, Ch. 66, C. S. C.

An award having been declared void by the Supreme Court, was amended so as to meet the objection, and re-executed by the arbitrators after the time limited for making the award had expired. The company having filed a bill to set aside such award, as well as the original award, the defendant, by his answer, asserted the validity of both. The bill was dismissed on the ground that it was unnecessary. *Held*, that this, in effect, affirmed their validity, and an appeal was allowed.

Held, also, that where the company's arbitrator had not been notified pursuant to the statute of the time and place appointed for signing awards between the company and land owners, such awards were invalid by the statute C. S. C. ch. 66, sec. 11, sub-sec. 11, and that, although he had notified the other

arbitrators that he would not attend, and waived any notice. *Norvell v. The Canada Southern R. W. Co. : Cunningham v. The Same ; Duff v. The Same ; Gatfield v. The Same, and The Canada Southern R. W. Co. v. Norvell, Cunningham, Duff, and Gatfield*, 310.

BANKERS.

See TRUSTEE AND CESTUI QUE TRUST.

BREACH OF CONTRACT.

See CHARTER PARTY.

CALLS ON STOCK.

See INCORPORATED COMPANY.

CARRIERS.

The plaintiff, a dealer in grains, &c., in Canada, consigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford, in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the sea-board the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose, who, on payment of the additional freight, granted a fresh bill of lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the neces-

sary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that instead of being delivered in London, on the 12th February, it did not reach there until the 23rd of March, too late for the sowing trade, so that the seed had to be sold at a heavy loss.

Held, [affirming the judgment of the Court below, 1 O. R. 47]. (1) That the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the defendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London.

Seemle, that the same rule applies where the goods are not intended for immediate sale at their place of destination. *Monteith v. The Merchants' Despatch and Transportation Company*, 282.

CHARTER PARTY.

Held, affirming the judgment of the Queen's Bench (46 U. C. R. 235), that an appeal will lie from an award made pursuant to a consent reference at *nisi prius* under section 205 C. L. P. Act.

On the 3rd October the plaintiff chartered "The Erie Belle," a vessel owned by the defendants, to carry salt from Goderich to Milwaukee at 75 cents a ton. On the 11th October the defendants telegraphed informing the plaintiff that this vessel could not go, and requesting him to accept the services of another. Thereupon some correspondence ensued between the parties, the plaintiff insisting upon

the defendants performing their contract, and they finally agreeing to do so. During all this time the plaintiff could have had the salt conveyed by other vessels at \$1.00 per ton, but did not, preferring to wait for the defendant's vessel which was loaded on the 25th of November. Owing however to the apprehensions of the captain as to the weather, which deterred him from going out, the vessel was frozen up in Goderich harbour, and it was then impossible to forward the salt otherwise than by rail; and for the purpose of endeavouring to carry out a sale which the plaintiff had made, he did send several tons by rail, and paid his consignee the difference in price for salt which he had to buy in Milwaukee and that agreed to be paid to the plaintiff.

The difference of expense in sending by rail and that agreed to be paid to the defendants, amounted to \$3.25 per ton.

Held, affirming the judgment of the Court below, that the plaintiff was not bound at the peril of losing all claim against the defendants for any additional loss, to have chartered another vessel at \$1.00 per ton, on receipt of the telegram of 11th October; and that, under the circumstances, the plaintiff was entitled to recover the difference paid to his consignee as also the excess of freight. [CAMERON, J., dissenting, who thought that the sum of 25 cents per bushel, allowed by the arbitrator, the advance in freight for which the salt could have been carried, was all that the plaintiff was entitled to recover.] *McEwan v. McLeod*, 239.

COMMUTATION FUND

See MEMBER OF SYNOD.

CONSENT REFERENCE.

See ARBITRATION.

CONSTRUCTION OF AGREEMENT.

See SALE OF LUMBER.

CONTRACT BY LETTERS.

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified, and should be prompt and immediately given. *Fulton Bros. v. Upper Canada Furniture Company*, 211.

The plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that it was to be "American inspection," and the plaintiffs answered: "We do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection:

Held (reversing the judgment of the Court below, 32 C. P. 422, that there had not been shewn "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties. *Ib.*

COSTS OF APPEAL.

The plaintiff had succeeded in respect of the title made under the judgment in partition, and not for the estate of the grantor in the

memorial; and the effect of that judgment seemed not to have been pressed in the Court below, and was not urged before the Court until the second argument. Under the circumstances the appeal was dismissed, without costs. *Van Velsor et al. v. Hughson* 390.

COSTS PAID TO SOLICITOR OF ADMINISTRATOR.

See ADMINISTRATOR PENDENTE LITE.

CREDITORS, LIABILITY OF TO REFUND.

See ADMINISTRATION.

CULLER'S MEASUREMENTS.

See SALE OF LUMBER.

CULLING TIMBER.

See SALE OF LUMBER.

DEED,

PAROL EVIDENCE TO ADD TO OR VARY THE EXPRESSED CONSIDERATION OF A,

See PAROL EVIDENCE, &c.

DEFICIENCY.

See ADMINISTRATION,

DEPOSIT OF CLIENT'S MONEY.

See TRUSTEE AND CESTUI QUE TRUST.

DISCRETION OF JUDGE.

See LEAVE TO APPEAL TO SUPREME COURT.

DISTRESS FOR RENT.

The judgment of the Court below (46 U. C. R. 7) reversed, as the plaintiff had not shewn that he was solely entitled to possession of the logs, the subject of distress and the seizure as regarded his co-owner being lawful the plaintiff could not maintain replevin, SPRAGGE, C.J.O., dissenting, who thought that even if the logs were the joint property of the plaintiff and one of the tenants, and had been delivered to the millers for the purpose of being manufactured into lumber, they could not be distrained on, for their being on the premises for that purpose had the effect of exempting them from distress; and that under the circumstances there should be a reference back to the Judge who had already tried the case to find the facts more distinctly. In the event of that being impracticable that there should be a new trial. *Paterson v. Thompson* 326.

EQUITY OF REDEMPTION.

See STATUTE OF LIMITATIONS, 4.

EVIDENCE.

See SALE OF LUMBER.

EVIDENCE OF TITLE.

1. A memorial registered over 60 years, but executed by the grantee only—*Held*, not sufficient secondary

evidence of the deed to which it purported to relate, notwithstanding that conveyances had been made at early dates by persons claiming under the registered title, but who had not had actual possession of the land. *Van Velsor et al. v. Hughson*, 390.

2. The land in question was one out of several lots mentioned in the memorial, which had been patented by the Crown to the grantor named in the memorial, and two others, as tenants in common. The memorial set out a grant of an undivided moiety of each lot described in it. Proceedings in partition had been taken in 1834 by the grantee against another tenant in common, in which the lot in question had been assigned in severalty to the grantee:

Held, that these proceedings did not, even in connection with the conveyances above mentioned, avail to make the memorial admissible as evidence of the deed.

Held, also, that it would not be made admissible by the fact that possession of some of the lands had gone in accordance with it, so long as there had been no such possession of the lands now in question; and that it was not aided in this respect by the Vendors and Purchasers Act, R. S. O. ch. 109. But *Held*, that the plaintiffs, who claimed only an undivided moiety of the lot under the grantee named in the memorial, while they could not recover in respect of the title of the grantor in that memorial, could nevertheless make title, by virtue of the judgment in partition, to the undivided interest of the patentee against whom the partition was had; that judgment being evidence as against the last-mentioned patentee of title to the whole lot. *Ib.*

3. One of the three patentees was not accounted for by the evidence, and it was not shewn that her title had devolved upon the others. The plaintiffs were therefore *held* entitled to recover only for one undivided third part of the land. *Ib.*

FALL OF MARKETS.

See CARRIERS.

FIRE.

See NEGLIGENCE.

FRAUDULENT PREFERENCE.

In March, 1879, the defendant E., a milliner, removed her business to the village of Tara, and in the November following changed her then residence and place of business to a shop owned by her co-defendant, adjoining to and under the same roof as his own. In the spring of 1880 the defendants commenced other business transactions, when her co-defendant lent E. \$120 to enable her to purchase stock she promising to give him security for its repayment by executing in his favour a mortgage on everything she had. The parties continued their business relations, T. advancing E. money from time to time, till in November, 1880, she was indebted to him in the sum of \$352, including one year's rent of her shop, and for which she executed a chattel mortgage, covering all her stock-in-trade and household effects. Both defendants swore that E. refused to execute the security, notwithstanding her promise to do so, until after the receipt by her of a

letter from T.'s solicitor demanding payment, or in default an action would be brought.

Per SPRAGGE, C. J. O., and BURTON, J. A., [affirming the judgment of FERGUSON, J., 1 O. R. 119,] that although the transaction was open to grave doubts, yet the same having been sustained by the Judge who heard the evidence, and who considered that there was sufficient pressure proved to shew that the mortgage was not given voluntarily, there was no sufficient grounds shewn to justify an interference by this Court with the decision of the learned Judge.

Per PATTERSON and MORRISON, JJ. A., dissenting.—The evidence sufficiently established that the mortgage was given with intent to prefer the mortgagee to the other creditors of the mortgagor, that it was not given in consequence of pressure on the part of the mortgagee or in fulfilment of a promise to give it; and even if such pressure or promise had satisfactorily been shewn, the intent to prefer would nevertheless have existed within the meaning of the statute, and have defeated the mortgage. *Brayley v. Ellis and Taylor*, 565.

GIFT INTER VIVOS.

The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not indorsed by him. The evidence, in the Master's office, on taking the accounts of the estate, shewed that the wife had taken possession of this and other notes belonging to her husband during his lifetime. The Master at London found that under the circumstances appearing in the report of the case (29 Gr. 443), the testator had intended the note to belong to

the widow, and that it did not form part of the assets of the estate, which finding was reversed by the Court, [BLAKE, V. C.]

Held, Per SPRAGGE, C. J. O., and MORRISON, J. A., [reversing the order then pronounced], that the evidence established a valid gift *inter vivos*.

Per BURTON and PATTERSON, JJ. A. That even if the facts shewn in the evidence failed to establish a good gift *inter vivos*, the testator under the circumstances had constituted himself a trustee for his wife of the note.

Per BURTON, J. A. The mere delivery of such a note, not indorsed, could not take effect as a gift *inter vivos*.

Per SPRAGGE, C. J. O. There is no distinction in this respect between a gift *inter vivos* and a *donatio mortis causa*. *Re Murray—Purdham v. Murray*, 369.

INCORPORATED COMPANY.

The plaintiff, by their Act of Incorporation, were authorized to call in the stock by instalments as the directors should appoint, subject to a proviso that "no instalment shall exceed ten per cent., or be called for or become payable in less than thirty days after public notice shall have been given in one or more of the newspapers published in every district where stock may be held."

Held, per SPRAGGE, C. J. O., and HAGARTY, C. J., that the time fixed for the payment of instalments need not be thirty days apart; but that instalments might be made payable at any time, provided no call exceeded ten per cent., and thirty days intervened between the date of notice

of the call and the day on which it was payable.

Per BURTON and PATTERSON, JJ. A., that no instalment could lawfully be made payable in less than thirty days from the day for payment of the next preceding instalment.

Per SPRAGGE, C. J. O., and HAGARTY, C. J.— Notice of a call published in a newspaper in one district is sufficient to render the shareholders residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held.

BURTON and PATTERSON, JJ. A., held that the enactment as to notice ought to be construed strictly; particularly if by a liberal reading of the other provision calls were held valid though payable at shorter intervals than thirty days. *Provincial Insurance Co. v. Worts*, 56.

See also ACTION BY CREDITOR AGAINST SHAREHOLDER.

INDORSEMENT.

See MARRIED WOMAN.

INSOLVENCY.

See STATUTE OF LIMITATIONS.

INSPECTION OF STEAM-BOATS.

See NEGLIGENCE.

IRREGULAR JUDGMENT.

See ACTION BY CREDITOR AGAINST SHAREHOLDER.

JOINT OWNERSHIP OF
GOODS.*See* DISTRESS FOR RENT.

JUDGMENT IN PARTITION.

See COSTS OF APPEAL.

LEAVE TO APPEAL TO SUPREME COURT.

Held, SPRAGGE, C.J.O., *dubitante*, that an appeal will not lie from the order of a Judge of this Court, extending the time for appealing to the Supreme Court of Canada.

Semble, per SPRAGGE, C. J. O., where an appeal is made from the exercise of discretion by a Judge, as in this case, the Court should not review his exercise of discretion. *Neill v. Travellers' Insurance Company*, 54.

LEGISLATIVE SANCTION

See NEGLIGENCE.LIABILITY OF CREDITORS
TO REFUND.*See* ADMINISTRATION.LIABILITY OF SOLICITOR
TO REFUND.*See* ADMINISTRATOR PENDENTE LITE.

LIMITATIONS, STATUTE OF.

See STATUTE OF.

MARRIED WOMEN.

The defendant, a married woman, was entitled to dower in the lands of a former husband who died in 1866, but dower had not been assigned to her. After the death of her said husband she continued to reside on the lands till 1882, when she indorsed a note for the accommodation of her son, and to an action thereon she set up that she had no separate estate, but even if she had, being an accommodation indorser only, she was not liable. A verdict having been rendered against her, she moved for a new trial, alleging in addition to her former defence, want of notice of dishonour. That application having been refused she appealed to this Court, when the ruling of the learned Judge below was affirmed as the production of the protest for non-payment was sufficient evidence of the notice of dishonour, and there was not any merit in the other defence sought to be raised. *Southam v. Ranton et al.*, 530.

MEASURE OF DAMAGES.

See CARRIERS.—CHARTER PARTY.

MEMBER OF SYNOD.

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society, upon trust to pay to the commuting Clergy their stipend for life, and when such payment should cease then "for the support and maintenance of the Clergy in such manner as should from time to time be declared by any by-law or by-laws of the said Church Society, to be from time to time passed for that purpose." In 1869 a by-law was passed providing that

out of the surplus of the Commutation Fund, clergymen of eight years and upwards active service should receive each \$200 a year, with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the Church Society) repealed all previous by-laws respecting the fund and made a different appropriation of it.

Held, reversing the judgment of PROUDFOOT, J. (29 Gr.348,) that they had power to do so under the terms of the trust, and that the plaintiff had no contract or vested right which could entitle him to object.

Semble, that the proceedings of the Synod when the by-law was passed in 1876, as set out in the case, were regular. *Wright v. Huron*, 411.

[Case carried to Supreme Court.]

MEMORIAL EXECUTED BY GRANTEE.

See EVIDENCE OF TITLE, 2.

MENTAL CAPACITY.

The testator, a man of education, and a minister of the Presbyterian Church, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were entirely obtained by the person preparing it, by putting questions to the testator as to the disposition of his different properties, and suggesting also the objects of his bounty; such will, when drawn, having been

read over to the testator clause by clause, who expressed his consent to some of the bequests, while as to others he made intelligent remarks, and some changes in the provisions thereof. The Court (BLAKE, V. C.), in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate; although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act; that there had not been any previous intention on his part to make a will; that he was a man who, when in possession of his mental facilities, was not likely to take suggestions from others; that not a single bequest or devise originated with the deceased; that the writer of the will did not know what property the deceased had, and admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several; that the will was inofficious; that the testator was 84, and during the preparation of the will, as one clause would be written out after his giving assent to a devise or bequest, he fell into a doze or sleep, from which he had on each occasion to be aroused; that it took two hours to prepare the will, although it covered but one foolscap sheet, and that the parties preparing the will sent for and obtained the numbers of the lots devised by the will from a neighbour, thus shewing that they could not obtain such information from the deceased. On appeal, the Court being equally divided, the decree stood, and the ap-

CONSENT REFERENCE.

See ARBITRATION.

CONSTRUCTION OF AGREEMENT.

See SALE OF LUMBER.

CONTRACT BY LETTERS.

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified, and should be prompt and immediately given. *Fulton Bros. v. Upper Canada Furniture Company*, 211.

The plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that it was to be "American inspection," and the plaintiffs answered: "We do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection:

Held (reversing the judgment of the Court below, 32 C. P. 422, that there had not been shewn "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties. *Ib.*

COSTS OF APPEAL.

The plaintiff had succeeded in respect of the title made under the judgment in partition, and not for the estate of the grantor in the

memorial; and the effect of that judgment seemed not to have been pressed in the Court below, and was not urged before the Court until the second argument. Under the circumstances the appeal was dismissed, without costs. *Van Velsor et al. v. Hughson* 390.

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DEED,

PAROL EVIDENCE TO ADD TO OR VARY THE EXPRESSED CONSIDERATION OF A,

See PAROL EVIDENCE, &c.

DEFICIENCY.

See ADMINISTRATION,

DEPOSIT OF CLIENT'S MONEY.

See TRUSTEE AND CESTUI QUE TRUST.

NOTICE

See PURCHASE WITH AGREEMENT
TO RE-SELL.

NOTICE

[OF ASSESSMENTS.]

See MUTUAL INSURANCE COMPANY, 2.

NOTICE OF CALLS.

See INCORPORATED COMPANY.

NOTICE OF DISHONOUR.

See MARRIED WOMEN.

PAROL EVIDENCE

[TO ADD TO OR VARY THE EXPRESSED
CONSIDERATION OF DEED.]

A conveyance was made by the plaintiff to the defendant for the expressed consideration of \$5,000.

It was shewn by the evidence of the plaintiff and her two daughters, that the defendant in bargaining for the purchase of a lot of land, had agreed to give \$7,500 therefor, the defendant paying \$5,000 down and retaining in his hands \$2,500 to meet certain claims which he alleged were likely to be made against the property. This the defendant denied, but PROUD-FOOT, J., before whom the evidence was taken, was of opinion that the bargain was as sworn to by the plaintiff and pronounced judgment giving her a lien for the \$2,500 and interest. On appeal this judgment was affirmed, BURTON, J. A., dissenting, and PATTERSON, J. A., *dubitante*.

Remarks as to the admissibility of parol evidence in such a case. *Marsh v. Hunt*, 595.

PLEA OF FRAUD.

See ACTION BY CREDITOR AGAINST
SHAREHOLDER.

PRACTICE.

Leave was given to the plaintiff to amend by setting up the statute of limitations upon payment of costs, which were paid to and accepted by the defendant. Upwards of a year afterwards the defendant objected that such order had been improperly made.

Held, that it was then too late to object that the order had been made in error. *Court v. Walsh*, 294.

PRESSURE.

See FRAUDULENT PREFERENCE.

PROCESS NOT DULY SERVED.

See ACTION BY CREDITOR AGAINST
SHAREHOLDER.

PUBLICATION OF NOTICE OF
CALLS.

See INCORPORATED COMPANY.

PURCHASE WITH AGREE-
MENT TO RE-SELL.

In August, 1866, the plaintiff in consideration of \$500, which she asserted was by way of loan, conveyed to M. 100 acres of land by a deed absolute in form. The plaintiff alleged that M. agreed that if the money were

repaid during his lifetime, he would accept the same and reconvey the land. The plaintiff in 1871 applied to M. to accept the amount of principal and interest remaining due (she alleging that she had paid \$10 on account thereof) and reconvey the land to her, which request M. refused to comply with. Subsequently, and in June of that year, M. sold and conveyed the land to R. & McK. for \$1200, and they in June, 1872, sold and conveyed to B. for \$2000, alleged to be its full value, taking a mortgage for part of the consideration money, which they transferred for value to one W. (not a party to the suit). During the time R. & McK. held the property, they, with the knowledge of B., had cut and disposed of large quantities of wood and timber growing thereon, without any attempt on the part of the plaintiff to restrain them. In November, 1873, the plaintiff instituted proceedings in Chancery seeking to redeem, alleging that the deed she gave was a security merely, and a decree was pronounced in her favor, Spragge, C. being of opinion that the transaction was in reality one of mortgage, and that on the pleadings set out in the report, the defendants R. & McK. and B. had distinctly admitted the allegations of the bill in this respect. On appeal, this Court being equally divided the appeal was dismissed, and the decree for the plaintiff stood.

Per HAGARTY, C. J., and BURTON, J. A.—At most the transaction was one of purchase by M., with a verbal undertaking on his part to re-sell on payment of what should be found due.

PATTERSON, J. A.—While entertaining grave doubts of the plaintiff's right to recover, thought that the evidence did not establish the fact of

B. having purchased without notice of the plaintiff's alleged right to redeem; and in view of the fact that Spragge, C., who heard the evidence, considered that the fact of notice was fully established, thought the decree should be affirmed.

Per PROUDFOOT, J.—The transaction was in reality a security only for the advance of money, and B. bought with actual notice of the plaintiff's claim, and therefore she was entitled to redeem.

Per HAGARTY, C. J.—This Court is allowed and required by law to give judgment "according to the very right and justice of the case," and up to the last moment has the right to make any amendment proper for the attainment of that end. Therefore where the defendants had by their answers admitted the truth of certain paragraphs of the bill which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence.

Per HAGARTY, C. J.—If "an equitable lien, charge or interest" be created by deed or by any writing capable of being registered, actual notice of such deed or instrument will, under the 67th section of the Registry Act, 31 Vict. ch. 20 (O.) prevent the effect of priority of registration. But as to equitable liens, &c., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition

of real property, unless in cases of actual moral fraud, a stringent observance of the registry law is the wisest rule to adopt.

Per PROUDFOOT, J.—The fact that a man who knows of another's title to land, buys in such a way as to get a title on the register and then sets the owner at defiance is such a clear case of active fraud as would deprive him of the protection of the Registry Act.

Per PATTERSON, J. A., and PROUDFOOT, J.—The ruling in *Forrester v. Campbell*, 17 Gr. 379, that the Registry Act of 1865, (sec. 66), does not avoid an equity as against a subsequent instrument though registered, if taken with notice, approved of *Peterkin v. McFarlane*, 429.

RAILWAY ACT CH. 66 R. S. C.

[AWARD UNDER.]

See AWARD, &c.

REFUND, LIABILITY OF CREDITORS TO.

See ADMINISTRATION.

REFUND, LIABILITY OF SOLICITOR TO.

See ADMINISTRATOR PENDENTE LITE.

REGISTRY ACT.

See PURCHASE WITH AGREEMENT TO RE-SELL.

SALE OF LUMBER.

The defendant R. contracted with the plaintiffs to deliver on their vessels

at Montreal a large quantity of deals, and he delivered in 1877, all but 108 standard hundreds. These could not be shipped till the spring of 1878, and R. required in the meantime to receive payment for them. He had in his yard at Ottawa more than the required quantity of deals; and in place of then separating and delivering to the plaintiffs the 108 standards, he procured his son to give a storage receipt under 34 Vict. ch. 5 (C.) acknowledging the receipt from the Ontario Bank of 108 standard hundreds of deals specifying the qualities required by the contract. The bank thereupon gave a guaranty to the plaintiffs that those deals should "be satisfactorily culled next spring previous to shipment, and that any question arising as to the same shall be settled in the manner usual in Quebec, viz.: Messrs. D. & Co., for purchasers, and Messrs. C. & R., for Mr. R., to agree upon a sworn culler to act in the interests of both parties." Thereupon the plaintiffs paid for the deals, and the bank received the money.

In the spring of 1878 R. forwarded 108 standards to Montreal by two barges, being urged to expedition in so doing by the plaintiffs: and 60 standards were loaded on vessels of the plaintiffs, which sailed with them to England. The quality of the remaining 48 standards was objected to and they were landed at Montreal, and there culled and found deficient in quality. Messrs. C. & R., agents at Montreal for the defendant R., verbally agreed with the plaintiffs, after the 60 standards had been shipped, that the quality of the 48 standards should be taken to be the average of the whole 108.

Held, (SPRAGGE, C. J. O., dissenting), that the guaranty given by the

bank only required that the plaintiffs should be satisfied with the culling at R.'s yard in Ottawa, and that no objection having been made there the guaranty was satisfied.

But *held* also, that the bank was not bound by the agreement made at Montreal by C. & R., and even if the culling were to have been at Montreal the shipment of 60 standards having rendered it impossible to settle the question in difference in the manner agreed upon, the bank would have been discharged.

Held, that a copied specification of the entry of a culler's measurements in the books of the supervisor, signed by the supervisor or his deputy under C. S. Can., ch. 46, sec. 19, is receivable as evidence of such measurements. *Dobell et al., v. Ontario Bank and John Rochester*, 484.

SEPARATE ESTATE.

See MARRIED WOMEN.

SOLICITOR OF ADMINISTRATION.

See ADMINISTRATOR PENDENTE LITE.

SOLICITOR AND CLIENT.

See TRUSTEE AND CESTUI QUE TRUST.

SPECIFIC PERFORMANCE.

The defendant agreed to sell to the plaintiffs certain timber limits for \$25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently,

and on the 20th August, the plaintiffs wrote, excusing themselves for not having carried out the purchase, and asking for an extension of time, for their accepting or refusing "your limits one or two weeks—two weeks if possible."

In answer, G. suggested that it was not necessary to make any extension of time for the acceptance of the offer by the plaintiffs, and that if they wrote stating they were satisfied with the timber, the quality and the price, and that they only wished the extension of time to make their financial arrangements, adding, "and if you do this, you can consider this letter authority for the additional time." The plaintiffs wrote accordingly, and the further time asked for expired on the 10th of September, but they failed fully to complete the purchase at the time named, and G. sold to the other defendant Miller.

Held, [affirming the judgment of Boyd, C.] that looking at the nature of the property, the subject of the contract, time would, without any stipulation in respect thereof, be regarded as essential; and it was intended by the parties that it should be so, and understood by them that it was so; and the subsequent correspondence shewed it to have been expressly made so, and, therefore, that the plaintiffs were not entitled to a specific performance of the contract. *Crossfield v. Gould*, 218.

STATUTE OF LIMITATIONS.

1. The judgment of the Chancery Division (1 O. R. 167), affirmed, SPRAGGE, C. J. O., dissenting, the majority of the Court holding that an assignment, under the Insolvent

Act of 1875, by an insolvent mortgagor, does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagees against the land. *Court v. Walsh*, 294.

2. Upon the question of the Statute of Limitations it was *held* (affirming the judgment of the Court below 45 U. C. R. 252), that forty years was the period of limitation, and that the defendants had not shewn possession for that length of time. *Van Velsor et al. v. Hughson*, 390.

3. *Held*, reversing the judgment of the Court below (2 O. R. 405), that the disability clauses of the Real Property Limitation Act do not apply to actions of redemption, and therefore in this case all the mortgagees were barred (SPRAGGE, C. J. O., dissenting), but,

Semble, if it were otherwise the decree of Blake, V. C., adjudging that the titles of those tenants in common against whom the statutory period of limitation had run were barred, while the title of those against whom the time had not run were not barred was right. *Faulds et al. v. Harper et al.*, 537.

4. It appeared that the mortgagees took proceedings for sale, and one H. bought under the decree, and was declared the purchaser, by the report on sale. The mortgagee was in reality the purchaser, having procured H. to bid at the sale.

Per SPRAGGE, C. J. O.—The sale to the mortgagee was a fraud upon the plaintiffs, and they had not disentitled themselves to relief by delay, as for all that appeared the real facts as to the purchase were unknown to them until just before the filing of the bill.

Per BURTON, J. A.—An action to redeem a mortgage is not an action to recover land, within the meaning of the Real Property Limitation Act. *Ib.*

TESTAMENTARY CAPACITY.

See "MENTAL CAPACITY."

TIME OF THE ESSENCE OF THE CONTRACT.

See SPECIFIC PERFORMANCE.

TRUSTEE AND CESTUI QUE TRUST.

The plaintiff placed in the hands of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a Loan Company, and which it was arranged, between the plaintiff and J., in the presence of a local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the Loan Company, amounting with interest to \$6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favor of the plaintiff, and transmitted the same to the plaintiff on the 26th of August, 1881; telling the plaintiff

in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th of September following :

Held, that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof.

After the deposit of the plaintiff's money J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum.

Held, that the money so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S. ; but [in this reversing the judgment of the Court below] as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the plaintiff's demand.

The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or maturing after notice to the bank of J.'s death.

Held, that they could not do so, and in consequence of having made such claim both in this Court and the Court below, they were refused their costs. *Bailey v. Jellett et al.*, 187.

See also GIFT INTER VIVOS.

VENDORS AND PURCHASERS ACT.

See EVIDENCE OF TITLE, 2.

VESTED INTEREST.

See WILL, CONSTRUCTION OF, 1.

VESTED RIGHTS.

See MEMBER OF SYNOD.

WILL, CONSTRUCTION OF.

A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy, and direct the management of the property: and at her death or second marriage, "my son Thomas, if he be then living, shall have and take lot one, which I hereby devise to him, his heirs and assigns." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage to be equally divided among his said children. At such death or marriage all his personal property and estate remaining was to be equally divided among his children: Provided always that in the event of any of his children dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue; and in the event of such death leaving issue such issue to take the share which would have belonged to the parent

if then living; and lastly, he directed that in the event of his wife dying before him his property should be disposed of at his death, as therein-before directed at her death or second marriage, in the event of her surviving him, so far as practicable.

Thomas died unmarried before his mother.

On appeal from the judgment of the Chancery Division, pronounced by Ferguson, J. (29 Gr. 162):

Per SPRAGGE, C. J. O., and PATTERSON, J. A. (agreeing with Ferguson, J.), that the interest devised to Thomas was contingent upon his surviving his mother:

Per HAGARTY, C. J., and BURTON, J. A., that the interest vested in Thomas and was disposed of by his will.

Per SPRAGGE, C. J. O., and PATTERSON, J. A.—The proviso as to death of children with or without issue extended to all the testator's property:

Per HAGARTY, C. J., and BURTON, J. A.—It was confined to personal property. *Keefer v. McKay*, 117.

2. The testator by his will devised as follows:

"4th. I give and devise unto my son Nathan his heirs and assigns forever. * * as much of lot number 12, in the 1st concession of the township of Beverley, * * as I may die seized and possessed of (except therefrom the south 80 acres of said lot).

"5th. I further give and bequeath unto my said son Nathan, his heirs and assigns, the south 80 acres of said lot number 12 in the 1st con-

cession of the said township of Beverley, excepting so much thereof as I may have sold and conveyed, subject, however, as follows:" providing in certain events for the division thereof between the children of Nathan and the four other sons of the testator.

At the time of making the will the testator had sold portions of the said southerly 80 acres; amongst others, lots 1 and 2 on the south side of Margaret street, which afterwards became vested in his son George. Subsequently George reconveyed these lots to the testator. Nathan claimed that the consideration therefor was paid or secured by him, and that in fact they should have been conveyed to him.

Per SPRAGGE, C. J. O., and MORRISON, J. A., [agreeing with Ferguson, J.] that although the will spoke from the death of the testator these lots did not pass under it; but, [in this differing from Ferguson, J.;] that the facts, stated below, sufficiently established that the testator, as to these lots, was trustee for Nathan.

Per BURTON and PATTERSON, JJ. A., [differing from Ferguson, J.,] that the will spoke from the death of the testator and that therefore these lots passed under it.

The judgment of Ferguson, J., 1 O. R. 107, was therefore reversed. *Vansickle v. Vansickle*, 352.

WILL OBTAINED BY INTER-ROGATION.

. *See* MENTAL CAPACITY.

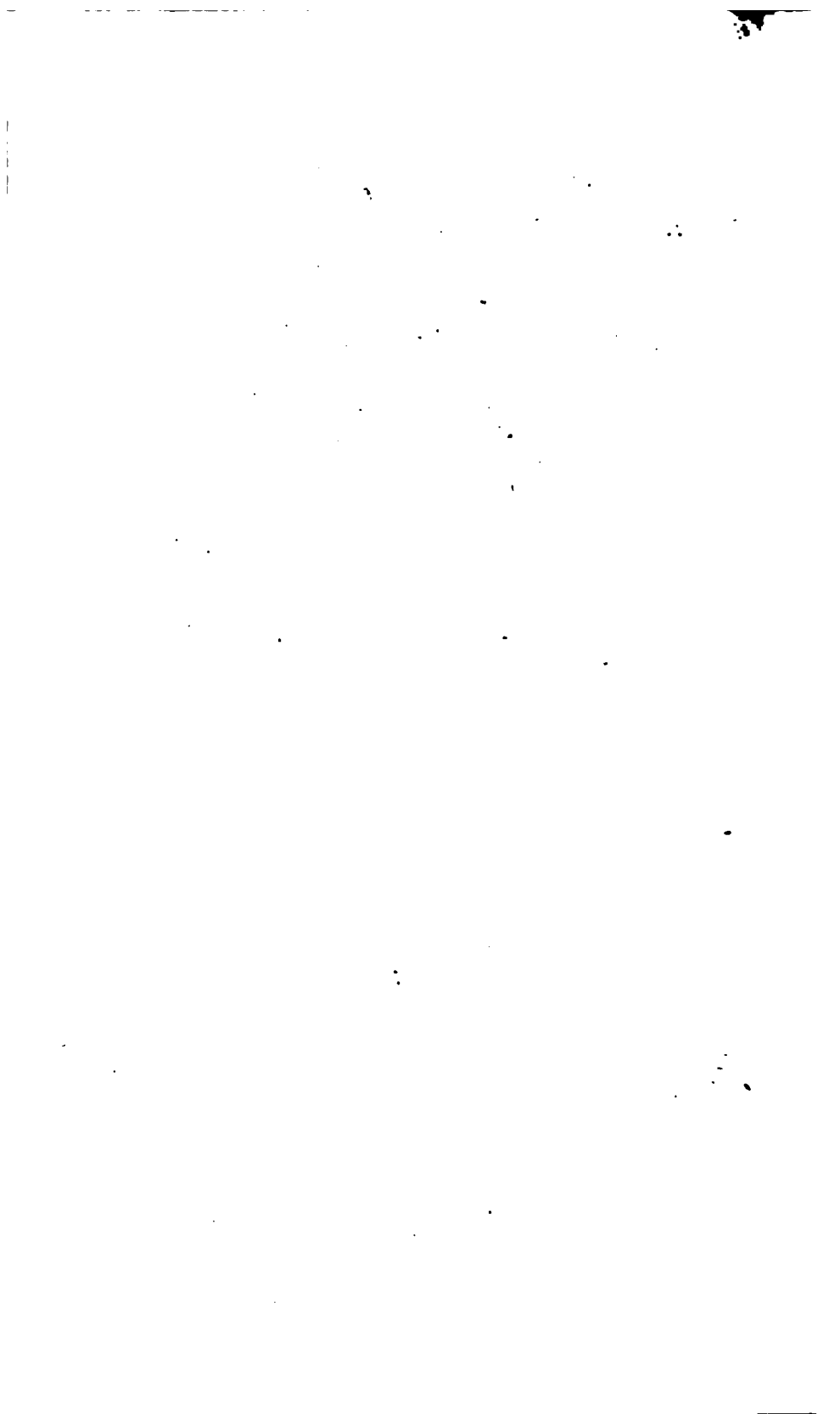


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